No. 06-1680 *** CAPITAL CASE ***

Title: Richard F. Allen, Commissioner, Alabama Department of Corrections, Petitioner
v.
Daniel Siebert

Docketed: June 19, 2007
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (06-11841)
Decision Date: March 7, 2007
Rehearing Denied: April 30, 2007

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 15 2007	Petition for a writ of certiorari filed. (Response due July 19, 2007)
Jul 12 2007	Order extending time to file response to petition to and including September 17, 2007.
Sep 17 2007	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation.
Sep 17 2007	Brief of respondent Daniel Siebert in opposition filed.
Sep 17 2007	Motion for leave to proceed in forma pauperis filed by respondent Daniel Siebert.
Sep 17 2007	Brief amici curiae of Illinois, et al. filed.
Sep 27 2007	Reply of petitioner Richard F. Allen, Commissioner, Alabama Department of Corrections filed.
Sep 28 2007	Letter of September 28, 2007, from counsel for petitioner received.
Oct 3 2007	DISTRIBUTED for Conference of October 26, 2007.
Oct 29 2007	DISTRIBUTED for Conference of November 2, 2007.
Nov 5 2007	Motion for leave to file amicus brief filed by Criminal Justice Legal Foundation GRANTED.
Nov 5 2007	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 5 2007	Petition GRANTED, Judgment REVERSED and case REMANDED. Justice Stevens and Justice Ginsburg dissent. Opinion per curiam.
Nov 30 2007	Petition for Rehearing filed.
Dec 5 2007	DISTRIBUTED for Conference of January 4, 2008.
Jan 7 2008	Rehearing DENIED.
Jan 7 2008	JUDGMENT ISSUED.

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No. __-___

In the

Supreme Court of the United States

Richard ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

v.

Daniel SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 15, 2007

QUESTION PRESENTED

(Capital Case)

In *Pace v. DiGuglielmo*, this Court held that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In a 1-page precedential opinion, the Eleventh Circuit ruled below, without any analysis, that the holding in *Pace* simply does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit – even where, as here, the time bar is both invoked and enforced. The question presented is whether the Eleventh Circuit's decision should be reversed because it impermissibly ignores the plain language of this Court's opinion in *Pace* and frustrates AEDPA's statutory purposes.

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OPINIONS BELOW

The September 30, 2002 decision of the United States District Court for the Northern District of Alabama dismissing Daniel Siebert's federal habeas corpus petition as untimely is not reported. It is reproduced at App. 2a-24a.

The June 23, 2003 decision of the Eleventh Circuit vacating the district court's limitations-based dismissal is reported at *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003), and is reproduced at App. 25a-48a.

The February 9, 2006 decision of the United States District Court for the Northern District of Alabama again dismissing Siebert's federal habeas corpus petition as untimely is not reported. It is reproduced at App. 49a-66a.

The March 7, 2007 decision of the Eleventh Circuit again vacating the district court's limitations-based dismissal is reported at *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007), and is reproduced at App. 1a.

The April 30, 2007 order of the Eleventh Circuit denying the State's petition for rehearing en banc is not reported. It is reproduced at App. 67a.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered the decision that is the subject of this petition for certiorari on March 7, 2007. *See* App. 1a. The Eleventh Circuit denied the State's timely petition for rehearing en banc on April 30, 2007. *See* App. 67a. This petition is timely because it is filed within 90 days of the order refusing en banc rehearing. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2244(d)(1) of Title 28 of the United States Code provides, in relevant part: "A 1-year period of

limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1).

2. Section 2244(d)(2) of Title 28 of the United States Code provides, in relevant part: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2).

INTRODUCTION

In the decision below, the Eleventh Circuit (Barkett, J., joined by Tjoflat and Wilson, JJ.)) held, in a summary – but precedential – opinion, that a state post-conviction petition that all agree was untimely filed (and, indeed, that was dismissed by the state courts specifically for having been untimely filed) was, despite its lateness, "properly filed" within the meaning of AEDPA's tolling provision, 28 U.S.C. §2244(d)(2). That holding is directly contrary to, and irreconcilable with, this Court's decisions in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Artuz v. Bennett*, 531 U.S. 4 (2000). Given the "obvious[ness]" of the Eleventh Circuit's error, this Court should grant the petition for certiorari and summarily reverse. *Gonzales v. Thomas*, 126 S. Ct. 1613, 1614 (2006). *See also, e.g., Horn v. Banks*, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision "directly contravene[s]" Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent").[1] Alternatively, and in view

[1] This Court has not hesitated to summarily reverse lower-court decisions misapplying the AEDPA-amended federal habeas statute. *See, e.g., Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Schriro v. Smith*, 546 U.S. 6 (2005); *Bell v. Cone*, 543 U.S. 447 (2005); *Holland v. Jackson*, 542 U.S. 934 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002).

of the fact that the logic of the Eleventh Circuit's decision – which distinguishes jurisdictional from defensive time bars for *Pace* purposes – has the potential to foreclose *Pace*'s application in as many as half the States in the country, this Court should grant the petition and set the case for briefing and argument.

STATEMENT OF THE CASE

A. Facts and State-Court Proceedings

In 1987, Daniel Siebert was convicted of capital murder and sentenced to death for killing Linda Jarman, the "hearing-impaired friend and next door neighbor" of Sherri Weathers, whom (along with her two young sons) Siebert had also murdered. *Siebert v. State*, 778 So. 2d 842, 843 (Ala. Crim. App. 1999). Siebert's conviction and sentence pertaining to the Jarman murder were affirmed on direct appeal, *see Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989), *aff'd, Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990), *cert. denied, Siebert v. Alabama*, 498 U.S. 963 (1990), and the certificate of judgment issued on May 22, 1990, *see Siebert*, 778 So 2d at 846.

Siebert filed a post-conviction ("Rule 32") petition in state circuit court – but not until August 25, 1992, several months after the expiration of the then-applicable two-year statute of limitations, *see* Ala. R. Crim. P. 32.2(c), which runs from the issuance of the certificate of judgment. *Siebert*, 778 So. 2d at 846.[2] The State answered Siebert's Rule 32 petition and, at least initially, did not raise a timeliness objection. *Id.*

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[2] At the time, Rule 32.2(c) stated, in pertinent part, that "the court shall not entertain any petition" on specified grounds "unless the petition is filed ... within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals ...." Ala. R. Crim. P. 32.2(c). Effective August 1, 2002, the rule was amended to shorten the filing deadline to one year; otherwise, the text of the rule remained unchanged.

On the second day of the state-court evidentiary hearing, the State amended its answer and "requested for the first time that the petition[] be denied pursuant to Rule 32.2(c) because the two-year limitations period allowed for filing a Rule 32 petition had expired." *Id.* Siebert sought and received the circuit court's permission to respond to the State's timeliness argument. R32, Vol. 7, p. 148-52.[3] "Out of an abundance of caution, the circuit court continued to hear Siebert's arguments" on the merits. *Siebert*, 778 So. 2d at 846. In doing so, however, the circuit court made clear that it was not suggesting that the State had waived the Rule 32.2(c) time bar. R32, Vol. 7, pp. 151-52.

Siebert subsequently responded in writing to the State's invocation of Rule 32.2(c)'s statute of limitations. R32, Vol. 3, p. 552. As relevant for present purposes, Siebert contended that the State had "waived its affirmative defense" of untimeliness "by failing to raise it in its first responsive pleading." *Id.* at 554.[4]

In its written order, the circuit court expressly rejected Siebert's waiver argument and held that the State "did not waive the statute of limitations defense by failing to raise it in its first responsive pleading." R32, Vol. 5, p. 879. Accordingly, the circuit court dismissed Siebert's Rule 32 petition as being "untimely filed pursuant to Rule 32.2(c) of the Alabama Rules of Criminal Procedure." *Id.* at 878. "In the alternative," the court ruled that Siebert's claims were "without merit." *Id.* at 881.

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[3] "R32" refers to the record compiled for post-conviction Rule 32 proceedings in state court.

[4] Siebert also argued (1) that the Rule 32 statute of limitations commenced not with the issuance of the certificate of judgment on May 22, 1990, but, rather, with this Court's denial of certiorari on direct appeal on November 5, 1990, and (2) that his failure to file on time was the result of "excusable neglect." R32, Vol. 3, pp. 558-64. The state courts rejected those arguments, *see* R32, Vol. 5, pp. 880-81; *Siebert*, 778 So. 2d at 848-49, and they have no bearing on the issues currently before this Court.

The Alabama Court of Criminal Appeals affirmed exclusively on statute-of-limitations grounds. Its reasoning was straightforward: Because "the certificate of judgment ... was issued on May 22, 1990," "[p]ursuant to Rule 32.2(c), Siebert's petition, filed August 25, 1992, was untimely." 778 So. 2d at 847. The appellate court expressly refused to address the merits of Siebert's time-barred claims, *see id.* at 846, and, further, expressly rejected Siebert's various efforts to avoid Rule 32.2(c), including his assertion that the State had waived the limitations bar by not pleading it initially, *see id.* at 847 ("Claim 2, asserting that Rule 32.2(c) must be raised as an affirmative defense in the first responsive pleading or it is waived, is without merit."). The Alabama Supreme Court denied Siebert's petition for certiorari. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000).

B. Federal-Court Proceedings

1. "*Siebert I*"

a. *District Court.* Siebert filed the federal habeas corpus petition that underlies this action in the United States District Court for the Northern District of Alabama on September 14, 2001. Doc. 1.[5] The State moved to dismiss the petition on the ground that it was time-barred under AEDPA's one-year statute of limitations, codified at 28 U.S.C. §2244(d)(1). The district court found that absent tolling, AEDPA's limitations period would have expired on April 23, 1997, at the conclusion of the one-year grace period applicable to petitioners whose convictions became final before the statute's enactment. App. 6a (citing *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209 (11th Cir. 1998)). The timeliness of Siebert's federal habeas petition, therefore, depended entirely

[5] On the same date, Siebert filed a separate federal habeas petition pertaining to the Weathers murder convictions (*see supra* at 3) in the United States District Court for the Middle District of Alabama. The Eleventh Circuit recently concluded that the claims in that petition were procedurally defaulted, *Siebert v. Allen*, 455 F.3d 1269 (11th Cir. 2006), and this Court denied certiorari, *Siebert v. Allen*, 127 S. Ct. 1823 (2007).

on whether Siebert could avail himself of 28 U.S.C. §2244(d)(2), which tolls AEDPA's limitations period during the time in which a petitioner has a "properly filed" state post-conviction petition pending. App. 7a. With respect to that question, the district court observed that "the state courts [had] determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed" and concluded that under the applicable law (including this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)) an untimely state post-conviction petition is not "properly filed" within the meaning of §2244(d)(2) so as to toll AEDPA's one-year statute. App. 8a-12a, 13a. The district court found itself "compelled" to conclude that "the untimely state petition was not a 'properly filed application' capable of tolling the limitation period" and, therefore, "to dismiss [Siebert's] habeas petition as time-barred under §2244(d)(1)." App. 13a.[6]

b. *Eleventh Circuit.* An Eleventh Circuit panel (the same panel that issued the decision that is the subject of this petition) vacated the district court's limitations-based dismissal and remanded for further proceedings. App. 25a-48a (*Siebert v. Campbell*, 334 F.3d 1018, 1032 (11th Cir. 2003) ("*Siebert I*")). The court of appeals held that Siebert's federal habeas petition was timely because, the court said, AEDPA's one-year statute had been tolled during the pendency of Siebert's state Rule 32 petition. Even though Siebert's Rule 32 petition had itself been filed late – and, indeed, had been dismissed by the state courts specifically on lateness grounds – the Eleventh Circuit found that it had been "properly filed" within the meaning of §2244(d)(2). App.

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[6] The district court rejected any contention that equitable tolling applied. App. 14a-16a. Siebert never sought review of that determination, either in the Eleventh Circuit in *Siebert I*, on remand to the district court, or on return to the Eleventh Circuit in what we are calling *Siebert II* (*see infra* at 7-9). Equitable tolling, therefore, is no longer at issue in this case. *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (holding that arguments not raised in appellant's opening brief are waived).

47a. In so holding, the Eleventh Circuit started from the premise (which it sought to draw out of *Artuz*) that "[c]ompliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular claim (or all claims)." App. 34a. In other words, the court of appeals determined, compliance with an applicable state statute of limitations is not – typically, anyway – a "proper[] fil[ing]" requirement as that term is used in §2244(d)(2). More specifically, the court held that because at the time Siebert filed his post-conviction petition Rule 32.2(c)'s time-bar was not jurisdictional, "timeliness was not a prerequisite to filing *per se*." App. 44a; *accord id.* at 36a (looking to Rule 32.2(c)'s "jurisdictional character"); *id.* at 37a ("jurisdictional character"); *id.* at 38a ("jurisdictional character"). Succinctly stated, *Siebert I* held "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(2) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth v. Mitchem*, 400 F.3d 857, 861 (11th Cir. 2005) (citing *Siebert I*, 334 F.3d at 1032).[7]

2. *"Siebert II"*

a. *District Court.* Following the Eleventh Circuit's remand to the district court, Siebert's federal habeas proceeding lay dormant for a period of months. Then, promptly on the heels of this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), which held, quite contrary to *Siebert I*, that an untimely state post-conviction petition is *not* "properly filed" for AEDPA tolling purposes, the State renewed its motion to dismiss. The State contended that *Pace* had effectively overruled and superseded *Siebert I*

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[7] The Alabama Supreme Court recently confirmed that "the limitations provision of Rule 32.2(c) is an affirmative defense and not a jurisdictional bar." *Ex parte Ward*, __ So. 2d __, __, 2007 WL 1576054, at *7 (Ala. June 1, 2007).

and urged the district court to dismiss Siebert's habeas petition as untimely under §2244(d). The district court did so.

The district court observed that in *Pace* this Court had held "that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 55a. Specifically, the district court emphasized that this Court had "stated simply: '[W]e hold that time limits, *no matter their form*, are "filing" conditions.'" *Id.* (quoting *Pace*, 544 U.S. at 417). The district court also highlighted the *Pace* Court's unqualified statement "that, when the state courts hold that a post-conviction petition is untimely under state law, '"that is the end of the matter" for purposes of §2244(d)(2).'" App. 57a (quoting *Pace*, 544 U.S. at 414). Because, the district court held, the Alabama courts here "determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed," the petition was not, under the plain language of *Pace*, "properly filed" for AEDPA tolling purposes. App. 59a.

The district court rejected any suggestion that Alabama's Rule 32.2(c) cannot be a "proper[] fil[ing]" condition because it is a defensive rather than a "jurisdictional" requirement. "Nothing in *Pace* or §2244(d)," the district court stressed, "says that only 'jurisdictional' rules constitute 'conditions to filing.'" App. 61a. By contrast, the district court observed, the *Pace* Court (1) spoke in categorical terms about *all* post-conviction time bars being "proper[] fil[ing]" requirements; (2) referenced other plainly non-jurisdictional rules (concerning, *e.g.*, forms and fees) as being filing conditions; and (3) actually pointed specifically to Alabama's Rule 32.2(c) as just the kind of rule it had in mind in holding that time bars are filing conditions. App. 61a-62a.

b. *Eleventh Circuit.* Which brings us to the decision now under review – *Siebert II.* In a 1-page summary (but published and precedential) opinion, the same Eleventh

Circuit panel that had reversed in *Siebert I* reversed yet again. App. 1a (*Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007) ("*Siebert II*")). In so doing, it decided an issue of exceptional importance with little more than a wave of the hand. After restating its earlier holding in *Siebert I* that, despite its acknowledged (and adjudicated) untimeliness, Siebert's Rule 32 petition had been "properly filed" within the meaning of §2244(d)(2) "so that his one year federal statute of limitations was tolled, making his federal petition timely," the Eleventh Circuit observed that, on remand, the district court had concluded that this Court's intervening decision in *Pace* had "superseded" and effectively overruled *Siebert I*. *Id.* The Eleventh Circuit, however, refused to "revisit[its] opinion in *Siebert I* in light of *Pace*." *Id.* Instead, in a single stroke, and without a shred of analysis or explanation, the court of appeals announced its holding as follows: "We find that the law of the case applies, noting that *Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that operated as an affirmative defense." *Id.* In other words, the Eleventh Circuit held that the rule of *Pace* – that an untimely state post-conviction petition is, by definition, not "properly filed" for AEDPA tolling purposes – applies *only* where the pertinent state time bar is jurisdictional, rather than defensive, in nature.[8]

The Eleventh Circuit's decision is indefensible. It should be reversed.

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[8] The court of appeals remanded Siebert's federal habeas petition to the district court for procedural-bar and merits determinations – determinations that necessarily presume the timeliness of the petition itself. App. 1a. The Eleventh Circuit's remand is "no impediment to certiorari" because "the opinion of the court below has decided an important issue, otherwise worthy of review, and [this Court's] intervention may serve to hasten or finally resolve the litigation." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.18, at 260 (8th ed. 2002) (collecting cases).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari (and either summarily reverse or set the case for briefing and argument) because the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, in the pages that follow, we will demonstrate (1) that this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), clearly supersedes *Siebert I*; (2) that the Eleventh Circuit's effort in *Siebert II* to deny *Pace*'s application to non-jurisdictional, defensive time bars flouts *Pace*'s plain language, AEDPA's underlying purposes, and common sense; and (3) that the Eleventh Circuit's strained reading of *Pace* implicates a question of national importance.

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PACE V. DIGUGLIELMO*.

Before jumping into the petition proper, there is one important preliminary point: The Eleventh Circuit's reference to the "law of the case" doctrine does not in any way shield its substantive determination concerning *Pace*'s applicability from this Court's review. The "law of the case" to which the court of appeals referred, of course, was *Siebert I*. But the very question presented here is whether, as the State has argued and the district court found, this Court's intervening decision in *Pace* supersedes *Siebert I*. Because by its own terms the law-of-the-case doctrine does not apply where "'controlling authority has since made a contrary decision of the law,'" C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 670 (2d ed. 2002) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)), the *Pace* and law-of-the-case issues are simply two sides of the same coin.[9] By invoking the law-of-the-case

[9] Indeed, Professors Wright and Miller emphasize that "[p]erhaps the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of

doctrine, the Eleventh Circuit, as its opinion makes clear, *necessarily* held that *Pace* does not apply to any state post-conviction time bar that "operate[s] as an affirmative defense." App. 1a. If, on the flip side, *Pace* does apply, then, by definition, the law-of-the-case doctrine does not, because the Eleventh Circuit is not at liberty for any reason (law-of-the-case or otherwise) to ignore this Court's binding precedent.

Accordingly, however framed, the dispositive question here is whether *Pace* applies. The Eleventh Circuit has held, in a published opinion that binds future court panels, *see, e.g.*, *Kuenzel v. Allen*, __ F.3d __, __, 2007 WL 1695110, at *1 (June 13, 2007) (following *Siebert II*),[10] that *Pace* does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit. App. 1a. The Eleventh Circuit's decision in that respect is plainly wrong, and it should be reversed.

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the particular case" and that, even within that subset, "[t]he easiest cases occur when the law has been changed by a body with greater authority on the issue" – for instance, "a higher court in the hierarchy of a single court system." C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 672 & n.50 (2d ed. 2002) (collecting court of appeals decisions refusing to apply law-of-the-case doctrine in the face of intervening Supreme Court authority). *Accord Moore's Federal Practice* §134.21[3][a] (2007) ("When, in the interim between the first and second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent.") (collecting cases, including *Davis v. United States*, 417 U.S. 333, 342 (1974)). The Eleventh Circuit purports to follow these established principles. *See Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (holding that the law-of-the-case doctrine does not apply where "controlling authority has been rendered that is contrary to the previous decision").

[10] *See also* Eleventh Cir. R. 36-3 I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent.").

There is no dispute here that without the benefit of statutory tolling under §2244(d)(2) Siebert's federal habeas petition would be barred as untimely. *See* App. 6a, 28a.[11] Nor is there any dispute here that Siebert's Rule 32 petition was itself untimely filed in state court: the certificate of judgment issued May 22, 1990; Siebert filed the Rule 32 petition underlying this action on August 25, 1992, several months beyond the then-applicable two-year deadline. *See supra* at 3. Nor, finally, is there any dispute here that the State invoked Rule 32.2(c)'s time bar as a basis for dismissing Siebert's Rule 32 petition and that the state courts found the petition untimely and dismissed it on that basis. *See supra* at 4-5. The question, therefore, is whether, *despite its lateness* – and, indeed, despite the state courts' unambiguous adjudications of its lateness – Siebert's Rule 32 petition was nonetheless "properly filed" within the meaning of §2244(d)(2), so as to toll the time for filing his federal habeas petition. In *Siebert I*, an Eleventh Circuit panel answered that question "yes." This Court's subsequent decision in *Pace* makes absolutely clear that, in fact, the answer is "no." Now, notwithstanding *Pace*, the same Eleventh Circuit panel has yet again answered the question "yes." The Eleventh Circuit's decision, which defies this Court's on-point precedent, cannot stand.

I. *Pace* Expressly Holds That An Untimely State Post-Conviction Petition Is Not "Properly Filed" For AEDPA Purposes And Thereby Supersedes *Siebert I*.

The argument that *Pace* overrules and supersedes *Siebert I* (whose holding the Eleventh Circuit reiterated, post-*Pace*, in *Siebert II*) is remarkably straightforward. There are two dispositive considerations. *First*, this Court in *Pace* used categorical language to make absolutely clear that, whatever the circumstances, an untimely state post-conviction petition is not "properly filed." And *second*, this Court in *Pace*

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[11] Again, equitable tolling is no longer at issue in this case. *See supra* note 6.

actually referred specifically to Alabama's post-conviction statute of limitations as an example of a "proper[] fil[ing]" condition.

A. This Court In *Pace* Used Unconditional Language To Make Clear That, No Matter The Circumstances, An Untimely State Post-Conviction Petition Is Not "Properly Filed."

The Eleventh Circuit in *Siebert I* and this Court in *Pace* started in exactly the same place. The *Siebert I* court said that "[t]he question before [it was] whether Siebert's Alabama petition[], which [was] accepted by the courts *but ultimately found to have been filed late*, should be considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 26a (emphasis added). The Eleventh Circuit answered that question "yes." Not long thereafter, this Court asked the very same question – "whether a state postconviction petition *rejected by the state court as untimely* nonetheless is 'properly filed' within the meaning of §2244(d)(2)" – but gave precisely the opposite answer: "We conclude that it is not." 544 U.S. at 410 (emphasis added).

Indeed, time and time again, this Court in *Pace* observed – as a categorical matter – that if a state post-conviction petition is determined by the state courts to have been untimely filed, then, by definition, it is *not* "properly filed" within the meaning of §2244(d)(2):

- Initially, this Court reiterated, in no uncertain terms and without exception, what it had said in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) – namely, that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.'" *Pace*, 544 U.S. at 413.

- In the same vein, this Court in *Pace* expressly "h[e]ld" – again, using unconditional language – that "[w]hen a postconviction petition is untimely under state law, '*that*

[is] the end of the matter' for purposes of §2244(d)(2)." *Id.* at 414 (emphasis added).

- Continuing, the *Pace* Court concluded – yet again, as a *per se* matter – that "[b]ecause the state court rejected petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." *Id.* at 417.

- Wrapping up, this Court declared unqualifiedly that state post-conviction "time limits, *no matter their form*, are 'filing' conditions." *Id.* (emphasis added).

- Indeed, even the Justices who dissented in *Pace* recognized that under the Court's categorical rule, "a state application will not be deemed properly filed ... if *the [state] court ultimately determines* that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420 (Stevens, J., dissenting) (emphasis added).

Pace simply couldn't be any clearer. All nine Justices plainly understood that if a state court deems an inmate's state post-conviction petition to have been untimely filed, then, *ipso facto*, the petition is not "properly filed" for AEDPA tolling purposes. In other words, *Pace*'s plain language establishes that the only relevant question in a given case is this: Did the state courts in *this particular* case find *this particular* post-conviction petition to have been untimely filed? If the answer to that question is yes, then – wholly without regard to the form or application of the limitation period – the petition was *not* "properly filed." All here – including the Eleventh Circuit – agree that Siebert's Rule 32 petition was untimely filed, and, more importantly, that the state courts expressly so found. *See supra* at 3-5; App. 26a (Siebert's petition was "ultimately found to have been filed late"). Under the plain language of *Pace*, "that [is] the end of the matter."

Or it should have been, anyway. Instead, by *ipse dixit*, the Eleventh Circuit here (in *Siebert II*) held that the *Pace* rule simply doesn't apply to any state post-conviction statute of limitations "that operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit – again, even where, as here, the time bar is both invoked and enforced. App. 1a. That limitation is a w'ole-cloth creation. It is utterly irreconcilable with the unambiguous terms in which the *Pace* Court itself repeatedly expressed its holding. Again, the controlling question under *Pace* is whether – not how or pursuant to what kind of rule, but simply *whether* – an inmate's "state postconviction petition [was] rejected by the state courts as untimely." 544 U.S. at 410. As Siebert's case shows, a petition can be untimely, and "rejected by the state courts" as such, *see id.*, just as surely under a defensive time bar as under a jurisdictional one.

It is just not possible to square the Eleventh Circuit's decision with the plain language of *Pace*. The court of appeals' opinion ignores this Court's own words in *Pace* in favor of an exception (*i.e.*, for non-jurisdictional, defensive statutes of limitation) that none of the Members of this Court seems even to have considered, let alone embraced.

B. This Court In *Pace* Pointed Specifically To Alabama Rule 32.2(c)'s Time Bar As An Example Of A "Proper[] Fil[ing]" Condition.

In addition to this Court's categorical language, there is the fact, emphasized by the district court here, that "the Supreme Court itself, in *Pace*, identified Alabama's time bar as one of the very types of rules that constitute 'conditions to filing'" for §2244(d)(2) purposes. App. 61a. Specifically, "[a]t footnote seven, the Court ... gives examples of the types of state procedural rules that constitute 'conditions to filing,' explicitly identifying Alabama's Rule 32.2(c) time limit as one." App. 62a. *Pace*'s footnote 7 – intended to highlight the distinction between "conditions to filing" and "conditions to obtaining relief" – reads as follows:

> *Compare, e.g.*, Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth v. Fahy*, 558 Pa. 313, 328, 737 A.2d 214, 222 (1999) (describing the time limit as "jurisdictional"); 2 Ala. Rule Crim. Proc. 32.2(c) (2004-2005) (stating that a court "shall not entertain" a time-barred petition), *with* 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004-2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz*, are present).

Pace, 544 U.S. at 417 n.7.

In footnote 7, therefore, this Court expressly lumped Alabama's post-conviction statute of limitations in with Pennsylvania's, and then contrasted the two limitations periods, as §2244(d)(2) "proper[] fil[ing]" conditions, with run-of-the-mill procedural bars, which merely "go to the ability to obtain relief." *Id.* at 417. Plainly, then, this Court "considered Alabama's Rule 32.2(c) to be the type of rule that is a 'condition to filing,' violation of which would preclude the petition from being 'properly filed' for §2244(d)(2) purposes." App. 62a-63a.

Siebert's (and, implicitly, the Eleventh Circuit's) response to *Pace*'s footnote 7 is to say that that it refers to the Pennsylvania post-conviction time limit there at issue in "jurisdictional" terms. *See* C.A. Blue Br. 12, 18-19. That is true, but it misses the point entirely. The point is that the balance of footnote 7 expressly places Alabama's Rule 32.2(c) – whether technically "jurisdictional" or not – *right alongside* Pennsylvania's rule as a "proper[] fil[ing]" requirement. The point is that the Court in *Pace* singled out

Alabama's Rule 32.2(c) as the very kind of rule it had in mind when it held that state post-conviction time bars are conditions to filing and, therefore, "proper[] fil[ing]" requirements within the meaning of §2244(d)(2).

II. The Eleventh Circuit's Holding In *Siebert II* That *Pace* Applies Only To Jurisdictional Statutes Of Limitation, And Not To Those That "Operate[] As An Affirmative Defense," Is Indefensible.

The crux of the Eleventh Circuit's holding in *Siebert II* (and its effort to salvage its earlier opinion) is its assertion that "*Pace* did not address ... a statute of limitations that operated as an affirmative defense." App. 1a. Thus, even after *Pace*, the Eleventh Circuit is clearly sticking with its pre-*Pace* view "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(1) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth*, 400 F.3d at 861 (citing *Siebert I*, 334 F.3d at 1032).

Tellingly, in the Eleventh Circuit, Siebert himself expressly disavowed any suggestion that §2244(d)(2)'s application should turn on a distinction between jurisdictional and defensive statutes of limitation: "Mr. Siebert does not contend that only jurisdictional rules are conditions of filing or even that only statutes of limitations which are jurisdictional are conditions of filing." C.A. Gray Br. 18. Any such argument, he told the Eleventh Circuit, "*would conflict with* Pace." *Id.*[12] Siebert was exactly right

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[12] That is not to say that Siebert threw in the towel before the Eleventh Circuit. Instead, before that court, Siebert objected principally that his failure to comply with Rule 32.2(c) should not preclude a finding that his post-conviction petition was "properly filed" under 2244(d)(2) because, he said, Rule 32.2(c) was not "firmly established and regularly followed" at the time he filed. *See* C.A. Blue Br. 13-15; C.A. Gray Br. *passim*. The State responded that *Pace* leaves no room for a consistent-application gloss on §2244(d)(2)'s plain language and, more importantly, that the Eleventh Circuit (indeed, the same panel in a parallel case involving

about that; the court of appeals should have heeded his warning.[13] As matters stand now, the Eleventh Circuit's decision restricting *Pace*'s application to jurisdictional time bars – and refusing its application to defensive time bars – directly conflicts with the plain language of the *Pace* opinion itself, undermines the purposes that animate AEDPA's limitations and tolling provisions, and defies common sense.

A. The Eleventh Circuit's Holding Directly Conflicts With The Plain Language Of This Court's Opinions In *Pace* and *Artuz v. Bennett*.

Is there any basis in the language of the *Pace* opinion itself for the Eleventh Circuit's imagined distinction between jurisdictional and defensive time bars? None whatsoever. It is certainly true, as we have said, that the Pennsylvania rule at issue in *Pace* was described as a "jurisdictional" time bar. *Pace*, 544 U.S. at 417 n.7. But there is absolutely *no* indication that the seemingly jurisdictional character of the Pennsylvania statute mattered to – let alone controlled – this Court's analysis or holding. Indeed, the evidence, even on the face of the opinion itself, is dispositively to the contrary.

1. As an initial matter, the categorical language of *Pace* does not distinguish between time bars that are jurisdictional and those that operate as affirmative defenses. By contrast,

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Siebert himself) has held that Rule 32.2(c) *was* "firmly established and regularly followed" at the time Siebert filed. *Siebert v. Allen*, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (citing *Hurth v. Mitchem*, 400 F.3d 857, 863 (11th Cir. 2005)), *cert. denied*, 127 S. Ct. 1823 (2007). The consistent-application issue is thus irrelevant here. In any event, in the decision under review, the court of appeals made nothing of the consistent-application issue, and it is clear from its opinion that the Eleventh Circuit would refuse to apply *Pace* to any statute of limitations that "operate[s] as an affirmative defense," no matter how uniformly applied. App. 1a.

[13] And ours. We presented the same argument to the Eleventh Circuit that we are presenting here (C.A. Red Br. 11-20) and, particularly contended there, as here, that *Pace* cannot reasonably be read to apply only to jurisdictional time bars (C.A. Red Br. 20-22).

Pace holds, unequivocally and without exception, that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)"; that "time limits, no matter their form, are 'filing' conditions"; and that where a "state court rejected [a] petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." 544 U.S. at 414, 417. Accordingly, under *Pace*'s plain language it just doesn't matter whether a state post-conviction time bar is jurisdictional or, instead, "operate[s] as an affirmative defense." App. 1a. All that matters, as we have said, is that the state courts in *this* case found *this* post-conviction petition to have been untimely filed. In that circumstance (which clearly obtains here), the state petition was not "properly filed" for §2244(d)(2) purposes. In other words, while *Pace* may by happenstance have arisen against the backdrop of a jurisdictional time bar, it is clear from the language it chose that this Court generalized its holding, in the interest of establishing an unambiguous rule, to include *all* state-court determinations of untimeliness.[14]

2. Moreover, as the district court here correctly recognized, not only is there "[n]othing in *Pace* or §2244(d) [that] says that only 'jurisdictional' rules constitute 'conditions to filing'" but, indeed, "many of the 'conditions to filing' identified by the Supreme Court" in *Pace*'s predecessor, *Artuz v. Bennett*, 531 U.S. 4 (2000), are quite obviously *not* strictly jurisdictional. App. 61a. In *Artuz*, this Court listed four common "proper[] fil[ing]" requirements:

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[14] Notably, this Court in *Pace* had every opportunity to limit the scope of its holding to technically jurisdictional state time bars. The respondent there repeatedly emphasized the jurisdictional character of Pennsylvania's post-conviction statute of limitations. *See* Br. of Respondent at 4-5, 7, 9-10, 12-18, 25-28, 35, *Pace* (No. 03-9627). This Court's published opinion, however, uses language that plainly applies to all state-court determinations of untimeliness, whether jurisdictional or not.

Alongside (1) "time limits upon [a petition's] delivery" (the filing condition reiterated in *Pace*), the *Artuz* Court mentioned (2) the "form of the document," (3) the "court and office in which it must be lodged," and (4) the "requisite filing fee." 531 U.S. at 8. *None* of those requirements, as the district court here understood, is "jurisdictional in the sense that the court lacks power to deal with the matter." App. 61a. Accordingly, the Eleventh Circuit's determination that only jurisdictional rules can be "proper[] fil[ing]" requirements – and, therefore, that because Rule 32.2(c)'s time bar "operated as an affirmative defense" it cannot be a filing condition – is doubly wrong: It is irreconcilable not only with *Pace* but also with *Artuz*.

B. The Eleventh Circuit's Holding Undermines The Purposes That Animate AEDPA's Limitations And Tolling Provisions.

It is not just the face of *Pace* that the Eleventh Circuit's decision here contradicts, but also *Pace*'s underlying logic. In *Pace*, this Court emphasized that "[t]he purpose of AEDPA's statute of limitations confirms th[e] commonsense" understanding that an untimely state post-conviction petition is, by definition, not "properly filed" within the meaning of §2244(d)(2). 544 U.S. at 413. Specifically, this Court was concerned that "[o]n petitioner's theory" – under which timely filing in state court would *not* have been a "proper[] fil[ing]" requirement – "a state prisoner could toll [AEDPA's] statute of limitations at will simply by filing untimely state postconviction petitions." *Id.* That, the Court said, "would turn §2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay." *Id.*

The *Pace* Court assumed that in holding that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," *id.* at 414, it had eliminated the risk that inmates would, as respondent argued there, "give themselves their own

extensions" – and thereby toll AEDPA's time bar indefinitely – merely "by filing an untimely state post-conviction petition." Brief of Respondent at 32, *Pace* (No. 03-9627). The Eleventh Circuit's decision here, however, resurrects that risk with respect to all inmates imprisoned in States (of which there are many, *see infra* at 25-30) whose post-conviction time bars are not strictly jurisdictional but, instead, "operate[] as an affirmative defense." App. 1a. In those States, an inmate may once again unilaterally extend the time for filing his federal habeas petition simply by lodging an untimely state petition – even in a case, like this one, in which (1) all agree that the state petition is time-barred, (2) the State expressly invokes the time bar, and (3) the state courts unambiguously find the petition to have been untimely filed and dismiss the petition on that basis.

That state of affairs – which follows straightaway from the Eleventh Circuit's artificial distinction between jurisdictional and defensive time bars – is irreconcilable with "AEDPA's acknowledged purpose of 'reduc[ing] delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). Worse, it is irreconcilable with the specific purpose of AEDPA's own limitations period, which is to "'restrict[] the time that a prospective federal habeas petitioner has in which to seek federal habeas review'" and thereby to "'reduc[e] the potential for delay on the road to finality.'" *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)).

C. The Eleventh Circuit's Holding Defies Common Sense.

In deciding the case the way it did – by wagering everything on a distinction between jurisdictional and defensive state time bars – the Eleventh Circuit seems to have lost sight of the fact that the point here is to interpret a statute, and that the controlling statutory term is "properly

filed." The question in this case, therefore, is whether Siebert's Rule 32 petition was "properly filed" within the meaning of §2244(d)(2). In *Pace*, this Court harked back to *Artuz*'s instruction that, in interpreting §2244(d)(2), courts should be "guided by the 'common usage' and 'commo[n] underst[anding]' of the phrase 'properly filed.'" *Pace*, 544 U.S. at 413 (quoting *Artuz*, 531 U.S. at 8, 9). In common and ordinary usage, the *Pace* Court held simply, a *late* petition is not a "properly filed" petition.

It is difficult to imagine why a state time bar's formal character as either a jurisdictional barrier or an affirmative defense should matter one whit to the statutory "proper[] fil[ing]" criterion. (And, indeed, recall that *Artuz*'s own catalogue of "proper[] fil[ing]" requirements referred only to *non*-jurisdictional rules. *See supra* at 19-20.) The fact that a state statute of limitations technically "operate[s] as an affirmative defense" (App. 1a) rather than a jurisdictional bar does not make a late-filed post-conviction petition any less late or, on the flip side, any more "proper[]." That is self-evidently true in a case like this one, where (1) all agree that the state petition was filed late, (2) the State expressly invoked the post-conviction time bar, and (3) the state courts flatly rejected any contention that the State had waived the time bar and, instead, enforced the bar by dismissing the petition. In that circumstance – the circumstance presented by this case – what possible difference could it make that the state statute of limitations was formally an affirmative defense rather than a jurisdictional barrier? The answer seems clear: none at all.[15] The Eleventh Circuit's decision

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[15] This is not a case in which the state courts found that a State had waived a defensive time bar and, on the basis of that waiver, went on to address the merits of a state post-conviction petitioner's claims. In that instance, a State, to be sure, could not seek to un-ring the bell by contending in federal court that, despite its state-court waiver, the petitioner's state petition was technically untimely and, therefore, not "properly filed." But where, as here, the state courts explicitly reject waiver arguments, find the state petition untimely, and dismiss it on that basis, "'that [is] the end of the matter' for purposes of §2244(d)(2)."

rests on a formalistic distinction between jurisdictional and defensive statutes of limitation that has absolutely no basis in §2244(d)(2)'s "proper[] fil[ing]" criterion or in the reality of post-conviction litigation more generally.[16]

III. The Eleventh Circuit's Decision Implicates A Question Of National Importance.

The State, of course, appreciates the fact that this Court "has traditionally expended its time and resources on those cases that present issues of national importance ...." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.2, at 223 (8th ed. 2002). This is just such a case. Alabama is by no means the only State affected here. The distinction at the heart of the Eleventh Circuit's decision – between jurisdictional time bars, which, it held, are §2244(d)(2) "proper[] fil[ing]" conditions, and defensive time bars, which are not – leaves a whole host of States right back where they started before this Court decided *Pace*.

Pace, 544 U.S. at 414. *Accord id.* at 410 (looking to whether state petition was "rejected by the state court as untimely"); *id.* at 417 (looking to whether "the state court rejected petitioner's [post-conviction] petition as untimely"); *cf. Evans v. Chavis*, 127 S. Ct. 846, 852 (2006) (looking to whether state courts gave any clear indication that a particular filing "was timely or untimely").

[16] The fact that *Pace* was a closely contested, 5-to-4 decision is irrelevant at this juncture. Whatever one's view about the Court's macro-level decision there that timely filing under state law is a "proper[] fil[ing]" requirement, there is no good reason to distinguish between jurisdictional and defensive time bars in applying that rule. Indeed, in his dissent, Justice Stevens argued that "most state laws respecting untimely filings of postconviction petitions" function as waivable affirmative defenses. *Pace*, 544 U.S. at 426 (Stevens, J., dissenting). Nonetheless, he recognized that under the rule adopted by the Court, "a state application will not be deemed properly filed ... if the [state] court ultimately determines that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420. State time bars – all of them – either are or are not "proper[] fil[ing]" requirements. There is no basis, either in *Pace* or elsewhere, for including some in that category but excluding others.

First, a bit of background: As a rule, statutes of limitation are *not* jurisdictional but instead, in the Eleventh Circuit's words, "operate[] as an affirmative defense." App. 1a. Perhaps most conspicuously, the Federal Rules of Civil Procedure expressly characterize "statute[s] of limitations" as "affirmative defense[s]," Fed. R. Civ. P. 8(c), and distinguish them from jurisdictional matters, *see* Fed. R. Civ. P. 12(b), (h). *Accord* C. Wright, A. Miller, *et al.*, 5 *Federal Practice & Procedure* §1278, at 644-45 & 656 n.12 (3d ed. 2004) (observing that under Federal Rules, statute of limitations is an "affirmative defense").

So, too, even outside the standard civil-procedure context, this Court has repeatedly recognized that statutes of limitation are affirmative defenses rather than jurisdictional barriers to suit. Most recently (and relevantly), this Court made precisely that observation about AEDPA's own one-year time bar: "A statute of limitations defense ... is not 'jurisdictional.'" *Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006); *accord id.* at 1686 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitations periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional ...."). Other examples abound. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1242 (2006) ("[T]ime prescriptions, however emphatic, 'are not properly typed "jurisdictional."'"); *Eberhart v. United States*, 126 S. Ct. 403, 404-05 (2005) (Federal Rule of Criminal Procedure 33's 7-day limitation period on motions for new trials is "nonjurisdictional" affirmative "defense"); *Kontrick v. Ryan*, 540 U.S. 443, 452-60 (2004) (bankruptcy rules' 60-day timely-filing requirement is a "claim-processing rule" that is not "jurisdictional" but, rather, provides an "affirmative defense"); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (Equal Access to Justice Act's 30-day timely-filing provision is not "jurisdictional"); *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones,

under the heading 'subject matter jurisdiction.'"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (EEOC timely-filing requirement is "not a jurisdictional prerequisite" but, rather, "like a statute of limitations," an affirmative defense). Indeed, at least as far back as 1887, this Court recognized the "general rule" that a statute of limitations "does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions." *Finn v. United States*, 123 U.S. 227, 232-33 (1887).[17]

State courts likewise treat statutes of limitation as defensive rather than strictly jurisdictional. The leading legal encyclopedias agree that while "[t]he expiration of a statute of limitations is an affirmative defense that may deprive a litigant of his or her right to recover," it "is not a jurisdictional defect," 54 C.J.S. *Limitations of Actions* §14 (Apr. 2007) (collecting decisions from Arkansas, California, Idaho, Illinois, Oklahoma, Texas, and Utah), and that "a statute of limitation generally is not jurisdictional" but, rather, "must be pleaded as an affirmative defense," 51 Am.Jur.2d *Limitation of Actions* §20 (Apr. 2007) (collecting decisions from Arizona, Arkansas, Colorado, Missouri, Rhode Island, and Utah).

Which brings us to state post-conviction time bars, specifically. That, of course, is where the rubber truly meets the road here. Against the foregoing backdrop, it is altogether unsurprising that our research indicates that, in addition to Alabama, at least 16 States treat their state post-conviction statutes of limitation as affirmative defenses

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[17] In *Kontrick*, this Court emphasized that "[c]larity would be facilitated if courts and litigants would use the label 'jurisdictional' not for claim-processing rules" like timely-filing requirements, "but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) within a court's adjudicatory authority." 540 U.S. at 455.

rather than as mandatory jurisdictional barriers: Alaska,[18] California,[19] Colorado,[20] Idaho,[21] Illinois,[22] Iowa,[23] Kansas,[24]

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[18] *See Nelson v. State*, 2003 WL 1731624, at *3-4 (Alaska Ct. App. Apr. 2, 2003) (unpublished) (observing that Alaska Statutes §12.72.020(a)(3)'s statute of limitations is "an affirmative defense" that may, in certain circumstances, be waived).

[19] *See In re Robbins*, 77 Cal. Rptr. 2d 153, 159 (Cal. 1998) (describing flexible timeliness standards inconsistent with treatment as strictly jurisdictional); *In re Clark*, 21 Cal. Rptr. 2d 509, 517-18 (Cal. 1993) (same).

[20] *See People v. Lanford*, 867 P.2d 50, 51 (Colo. Ct. App. 1993) (holding that compliance with state post-conviction time bar "is not a jurisdictional prerequisite for the review of the merits of [a petitioner's] attack"); *People v. Shackelford*, 851 P.2d 218, 221 (Colo. Ct. App. 1993) ("[F]ailure to attack the convictions in a timely manner does not implicate the jurisdiction of this court to resolve defendant's contentions."). Even after the Colorado post-conviction statute was amended in 1998 to permit (but not require) courts to notice untimeliness *sua sponte*, courts continue to recognize their discretion to entertain late petitions where the defense is not raised in the trial court. *See People v. Kilgore*, 992 P.2d 661, 662-63 (Colo. Ct. App. 1999).

[21] *See Kirkland v. State*, 149 P.3d 819, 821 (Idaho 2006) ("The statute of limitations for petitions for post-conviction relief is not jurisdictional. It 'is an affirmative defense that may be waived if it is not pleaded by the defendant.'" (quoting *Cole v. State*, 15 P.3d 820, 823 (Idaho 2000)).

[22] *See People v. Boclair*, 789 N.E.2d 734, 739-42 (Ill. 2002) (holding that state post-conviction time bar is not a "jurisdictional prerequisite" but, rather, "an affirmative defense and can be raised, waived, or forfeited by the State").

[23] *See Blackwell v. State*, __ N.W.2d __, 2007 WL 914074, at *1 (Iowa Ct. App. Mar. 28, 2007) (observing that post-conviction statute of limitations "is an affirmative defense generally raised by a responsive pleading") (citing *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989)).

[24] *See Alexander v. State*, 2007 WL 1309605, at *1 (Kan. Ct. App. May 4, 2007) (unpublished) (holding that state post-conviction time bar is "not jurisdictional, but rather an affirmative defense which must be pled"); *see also Johnson v. State*, 2007 WL 570182, at *4 (Kan. Ct. App. Feb. 23, 2007 (unpublished) ("affirmative defense"); *Scott v. State*, 2006 WL 3740876, at *4 (Kan. Ct. App. Dec. 15, 2006) (unpublished) ("affirmative defense").

Kentucky,[25] Maine,[26] Minnesota,[27] New Jersey,[28] Oregon,[29] South Carolina,[30] South Dakota,[31] Utah,[32] and Wisconsin.[33]

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[25] *See Justice v. Commonwealth*, 2006 WL 73456, at *1-2 (Ky. Ct. App. Apr. 12, 2006) (unpublished) (holding that the state post-conviction time bar is a "statute of limitations defense [that] must be affirmatively pled" and that "a failure to do so constitutes a waiver of that defense"); *Ballanger v. Commonwealth*, 2003 WL 21472662, at *3 (Ky. Ct. App. June 27, 2003) (unpublished) (citing *Bowling v. Commonwealth*, 964 S.W.2d 803, 805 (Ky. 1998), and analogizing state post-conviction time bar to 28 U.S.C. §2244(d)(1), which, the court said, "is a statute of limitations rather than a jurisdictional bar").

[26] *See Diep v. State*, 748 A.2d 974, 975 (Me. 2000) (holding that state post-conviction time bar does not implicate "subject matter jurisdiction").

[27] *See State v. Smith*, 2007 WL 1053335 (Minn. Ct. App. Apr. 10, 2007) (unpublished) (observing that under *Kost v. State*, 356 N.W.2d 680, 682 (Minn. 1984), and *Wensman v. State*, 342 N.W.2d 150, 151 (Minn. 1984), timeliness is only a bar where the State has been prejudiced by the delay or the petitioner has abused process). The Minnesota Legislature recently enacted a 2-year post-conviction statute of limitations to replace its abuse-of-the-writ regime. *See* Minn. Stat. §590.01 subd. 4(a) (effective Aug. 1, 2005). Our research does not reveal that any court has yet characterized the new limit as either jurisdictional or defensive. Minnesota, therefore, is also appropriately placed in the "twilight zone" category, *see infra* at 28-29.

[28] See *State v. Afanador*, 697 A.2d 529, 534 (N.J. 1997) (observing that state post-conviction time bar is flexible and may be relaxed according to factors such as a petitioner's "excusable neglect" and the degree of prejudice to the State); *see also State v. Pantusco*, 2006 WL 1549687, at *4 (N.J. App. Div. June 8, 2006) (unpublished) (referring to state post-conviction statute of limitations as a "time bar defense" that State could opt not to invoke).

[29] *See Palmer v. State*, 854 P.2d 955, 956 (Or. Ct. App. 1993) (holding that state post-conviction time bar is "not a limitation on the jurisdiction of the post-conviction court" but, rather, an "affirmative defense").

[30] *See Carter v. State*, 522 S.E.2d 342, 343 (S.C. 1999) (holding that State may "agree[] that the petitioner should be allowed to" file an out-of-time application and that, if it does so, it will be "estopped from asserting the statute of limitations as a defense").

[31] *See Flute v. Class*, 559 N.W.2d 554, 557 (S.D. 1997) (observing that post-conviction statute "authorizes (but does not mandate) the dismissal" of a petition whose late filing has prejudiced the State's ability to respond); *see also Jenner v. Dooley*, 590 N.W.2d 463, 468 (S.D. 1999)

Cf. also Carey v. Saffold, 536 U.S. 214, 225 (2002) (observing that there are "many" reasons that a state post-conviction court "will sometimes address the merits of a claim that it believes was presented in an untimely way," something it couldn't do if the time bar were truly jurisdictional). In addition, a number of other States presently exist in something of a twilight zone; their courts either have not expressly said whether their post-conviction statutes of limitation are jurisdictional or defensive or have issued contradictory pronouncements on the subject: Delaware,[34] Georgia,[35] Indiana,[36] Maryland,[37] Nevada,[38] North Carolina,[39] Oklahoma,[40] and Virginia.[41]

(holding that petitioner must be given opportunity to rebut presumption of prejudice that attaches at five years).

[32] *See Johnson v. State*, 134 P.3d 1133, 1137 (Utah 2006) (holding that state post-conviction time bar "is not absolute" but, rather, contains an interests-of-justice "safety valve" allowing for the consideration of an untimely petition); *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) (holding that a hard-and-fast limitation period may never be applied to bar a habeas petition and that "proper consideration of meritorious claims raised in a habeas petition will always be in the interests of justice" for purposes of permitting the untimely filing); *cf. James v. Galetka*, 965 P.2d 567, 570-73 (Utah Ct. App. 1998) (observing that statutes of limitation, in both the civil and the criminal context, are "affirmative defenses," not prerequisites to "subject matter jurisdiction").

[33] *See Coleman v. McCaughtry*, 714 N.W.2d 900, 902, 905-08 (Wisc. 2006) (holding that state habeas petition premised on claim of ineffective assistance of appellate counsel is subject to doctrine of laches, which is "affirmative defense" with respect to which the State bears the burdens of pleading and proof); *Jones v. State*, 233 N.W.2d 441, 446 (Wisc. 1975) (holding that the court-established 90-day limit for motions to reconsider sentence is "regulatory rather than jurisdictional," that a trial court may "entertain motions beyond that time in the exercise of its discretion"). Wisconsin courts have not definitively determined whether a laches or any other timeliness defense applies to other post-conviction petitions. *See, e.g., State v. Felton*, 2005 WL 1342213, at *8 (Wisc. Ct. App. June 7, 2005) (unpublished).

[34] *Compare State v. Watson*, 2002 WL 1652293, at *1 (Del. Super. July 19, 2002) (stating that time bar is "jurisdictional," at least to the extent that it "may not be enlarged"), *with State v. Allen*, 1990 WL 1104263, at

To be sure, there are States whose courts have deemed their post-conviction time bars to be jurisdictional,[42] and

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*1 (Del. Super. Jan. 24, 1990) (noting that State had "agreed to waive" the time bar then granting partial relief on the merits), and *State v. Dickens*, 602 A.2d 95, 99 (Del. Super. 1989) (time bar is "by no means absolute or unconditional").

[35] *See* O.C.G.A. §9-14-42(c) (1-year post-conviction time bar for misdemeanants and 4-year post-conviction time bar for felons). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[36] *See Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[37] *See* Md. Crim. Proc. §7-103 (10-year time bar in non-capital capital cases absent showing of "extraordinary cause"); *id.* §7-201 (210-day time bar in capital cases, subject to "good cause" exception). Our research did not identify any decisions definitively construing these provisions as jurisdictional or defensive in nature.

[38] *Compare Clem v. State*, 81 P.3d 521, 525 (Nev. 2003) (observing that petitioner may overcome state post-conviction time bar "with a sufficient showing of good cause and actual prejudice" and thereby suggesting that time bar is not strictly mandatory or jurisdictional), *with Sullivan v. State*, 96 P.3d 761, 764 n.6 (Nev. 2004) (suggesting, in footnote, that State could not "stipulate" that post-conviction petition was timely).

[39] *See* N.C. Gen. Stat. §15A-1415(a) (120-day post-conviction time bar in capital cases); *id.* §15A-1419(a)-(b) (denial warranted on basis of untimeliness, subject to "good cause" and "miscarriage of justice" exceptions). Our research did not identify any decisions definitively construing the time bar as jurisdictional or defensive in nature.

[40] *See* 22 Okla. St. Ann. §1089(D)(1) (90-day post-conviction time bar in capital cases). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[41] *See Hines v. Kuplinski*, 591 S.E.2d 692 (Va. 2004) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[42] *See Benton v. State*, 925 S.W.2d 401, 402 (Ark. 1996) ("The time limitations imposed in Rule 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief which is not properly filed."); *State v. Celestine*, 894 So. 2d 1197, 1198 (La. Ct. App. 2005) (post-conviction time bar is "jurisdictional"); *Walters v. State*, 933 So. 2d 313, 315 (Miss. Ct. App. 2006) (dicta) (post-conviction

there are a few others that do not presently impose time limitations on post-conviction filings.[43] The point remains, however, that even as matters stand now, the rationale of the Eleventh Circuit's decision here – refusing to apply *Pace* to any state post-conviction time bar that is not strictly jurisdictional in nature – effectively nullifies *Pace*'s clear holding in as many as half the States in the country. It is inconceivable that, having expressly held that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," 544 U.S. at 414, this Court in *Pace* intended – silently – to exempt an entire class of state time bars from that categorical rule.

CONCLUSION

The Eleventh Circuit's decision is both plainly wrong and, in real-world terms, quite significant. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

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time bar is "jurisdiction[al]"); *Peña v. State*, 100 P.3d 154, 163 (Mont. 2004) (post-conviction time bar is "jurisdictional" and "cannot be waived by the State"); *State v. Herbstman*, 974 P.2d 177, 179 (N.M. Ct. App. 1998) (post-conviction time bar "jurisdictional"); *State v. Biddings*, 2005 WL 1482875, at *1-2 (Ohio Ct. App. June 23, 2005) (post-conviction time bar "jurisdiction[al]"); *Greene v. State*, 2007 WL 1215022, at *5 (Apr. 25, 2007) (post-conviction time bar "jurisdictional").

[43] *See* D.C. Code §23-110; Hawaii St. Penal P. Rule 40; Mass. R. Crim. P. 30; Neb. Rev. Stat. §29-3001; N.H. Rev. Stat. §534:1 *et seq.*; N.Y. Crim. Proc. §440.10; N.D. Cent. Code §29-32.1-03; R.I. Gen. Laws §10-9.1-3; 13 Vt. Stat. Ann. §7131; W. Va. Code §53-4A-1.

Respectfully submitted,

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June 15, 2007

APPENDIX

United States Court of Appeals, Eleventh Circuit.
Daniel SIEBERT, Petitioner-Appellant,
v.
Richard F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent-Appellee.
No. 06-11841.

March 7, 2007.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

BARKETT, Circuit Judge:

Daniel Siebert filed a federal habeas petition pursuant to 28 U.S.C. § 2254 on September 14, 2001 challenging the validity of his conviction and sentence for the murder of Linda Jarman. The district court dismissed it as being untimely filed pursuant to 28 U.S.C. § 2244(d). This court reversed and remanded, finding that his state petition had been properly filed so that his one year federal statute of limitations was tolled, making his federal petition timely. We thus remanded for further proceedings. *Siebert v. Campbell,* 334 F.3d 1018 (11th Cir.2003) ("*Siebert I*"). However, instead of further proceedings, the district court revisited the timeliness issue and again dismissed the petition as untimely, finding that *Pace v. DiGuglielmo,* 544 U.S. 408, 125 S. Ct. 1807, 161 L.Ed.2d 669 (2005), superseded our decision in *Siebert I.* We find that the law of the case applies, noting that *Pace* did not address the question presented in *Siebert I,* to wit: a statute of limitations that operated as an affirmative defense. However, rather than continuing piecemeal litigation and revisiting our opinion in *Siebert I* in light of *Pace,* we again reverse and remand for further proceedings, including questions of procedural bar and the resolution of claims which were exhausted on direct appeal.

REVERSED AND REMANDED.

FILED 02 SEP 30 PM 2:02
U.S. DISTRICT COURT
N.D. OF ALABAMA

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DANIEL SIEBERT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-J-2323-E
	)	
MICHAEL HALEY,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
and the ATTORNEY GENERAL	)	
OF THE STATE OF	)	
ALABAMA,	)	
	)	
Respondents.	)	

ENTERED
SEP 30 2002

MEMORANDUM OPINION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Talledega County Circuit Court on March 19, 1987, for capital murder, for which he was sentenced to death. The petitioner, Daniel Siebert,[1] with the assistance of an attorney, filed the instant petition for writ

[1] In all trial court proceedings, the petitioner's first name is spelled "Danial," but the appellate courts and petitioner's counsel, in the petition for writ of *habeas corpus* filed here, spells the name as "Daniel."

of *habeas corpus* on September 14, 2001. He is incarcerated on Death Row at Holman Correctional Facility in Atmore, Alabama.

I. PROCEDURAL HISTORY

On March 19, 1987, the petitioner was convicted after a jury trial for the capital murder of Linda Ann Jarman[2] during the course of a robbery.[3] The jury recommended that petitioner be sentenced to death, and on April 17, 1987, the trial judge sentenced petitioner to death by electrocution.

Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed on April 14, 1989. *Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989). On March 30, 1990, the Alabama Supreme Court affirmed the decision of the appellate court. *Siebert v. State*, 562 So. 2d 600 (Ala. 1990). A certificate of judgment was issued by the Alabama Court of Criminal Appeals on May 22, 1990. The court did not send a copy to the petitioner, but did send a copy to the Talladega County Circuit Court. On November 5, 1990, the United States Supreme Court denied petitioner's application for writ of *certiorari*. *Siebert v. Alabama*, 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 408 (1990).

On or about August 25, 1992,[4] petitioner filed a petition for post-conviction relief in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.[5] The state

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[2] The victim's name is spelled "Jarmin" in some state court documents.

[3] In a separate trial held in Lee County after a motion for change of venue was granted in the Talladega Circuit Court, Siebert subsequently was convicted of capital murder in connection with the strangulation deaths of Sherri Weathers and her two young sons.

[4] The parties refer to the filing date as August 24, 1995. The document attached as defendants' Exhibit 36 shows a date stamp of August 25, 1995. The precise date is not relevant, however, to the ultimate resolution of this matter.

[5] The Rule 32 petition arising from his conviction for the murder of Jarman was ultimately consolidated in Talledega Circuit Court with the

filed an answer on October 15, 1992, and did not raise the defense that the petition was time-barred. The trial court conducted evidentiary hearings on petitioner's claims of ineffective assistance of counsel on April 3-5, 1995, and on September 26, 1995. On April 4, 1995, the state amended its answer and raised for the first time the defense that the petition was untimely filed. On December 30, 1998, the court ruled that the Rule 32 petition was untimely filed pursuant to Alabama Rule of Criminal Procedure 32.2(c). The court also addressed the petition on the merits and denied all claims. Petitioner appealed to the Alabama Court of Criminal Appeals, which affirmed the denial on December 30, 1999. *Siebert v. State*, 778 So. 2d 842 (1999). The Alabama Supreme Court denied *certiorari* on September 15, 2000, 778 So. 2d 857 (Ala. 2000). Petitioner did not seek review in the United States Supreme Court.

On September 14, 2001, the petitioner, represented by counsel, filed the instant *habeas corpus* petition. Petitioner filed an amended petition on October 26, 2001. On February 5, 2002, the respondents filed an answer and a motion to dismiss supported by a memorandum of law, contending that the petition is time-barred by operation of 28 U.S.C. § 2244(d)(1).[6] On March 20, 2002, respondents filed a supplemental memorandum of law. Petitioner filed a response to the motion to dismiss on May 6, 2002.

II. TIMELINESS

The respondents raise the issue that the instant petition may not be considered by the court because it is time-barred pursuant to 28 U.S.C. § 2244(d)(1). The court agrees that the one-year time deadline for the filing of this petition expired no later than April 23, 1997, that the petitioner's Rule 32

Rule 32 petition challenging his conviction in Lee County for the murders of Weathers and her two children.

[6] Respondents also raise issues of procedural default. Because the petition clearly is time-barred, the court need not address any other issue.

proceedings did not toll the running of the time, and that the petition cannot now be considered on the merits.

Section 2244(d), enacted April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), established for the first time a one-year deadline for the filing of *habeas* actions under § 2254 challenging the validity of state criminal convictions. The one-year limitation runs from the latest of any of four dates:

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

AEDPA further provides that the limitation period is subject to tolling under § 2244(d)(2), which states:

> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Subsection 2244(d)(2) provides for the tolling of the limitation period during those times the petitioner has pending a "properly filed" post-conviction petition in state

court. The term "properly filed application," however, is not defined by the statute, and it is the definition of this term upon which the timeliness of the instant petition depends. The State respondents argue that the instant petition was not filed within the one-year limitation period because no "properly filed" state court petition tolled the running of the limitation period.[7] In opposition to the motion to dismiss, petitioner argues that: (1) the federal *habeas* petition was timely because petitioner was required to exhaust his state court remedies before filing the federal petition, (2) the Rule 32 limitation period should not be enforced because it was not clear or well established at the time of petitioner's post-conviction proceedings; and (3) the Rule 32 limitation period was inconsistently applied at the time relevant to petitioner's post-conviction motion.

Turning to the facts of this case, the petitioner's judgment of conviction became final when the United States Supreme Court denied his petition for writ of certiorari on November 5, 1990. However, because that date was prior to the enactment of AEDPA, the petitioner would have the benefit of the one-year grace period, setting his deadline for filing a *habeas* petition in this court on April 23, 1997. *Wilcox v. Florida Department of Corrections*, 158 F.3d 1209 (11th Cir. 1998) (holding that a one-year grace period for filing a federal *habeas* petition would apply to those petitioners whose convictions became final before the date of AEDPA's enactment); *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). Consequently, absent any tolling, it is on that date the one-year limitation period would expire, causing any petition filed later than April 23, 1997, to be untimely.[8]

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[7] It is undisputed that the instant petition was not filed within AEDPA's one-year grace period.

[8] It is important to note that petitioner does not argue that any of the other three dates from which the limitation period might begin running under § 2244(d)(1) is applicable to his case. He does not point to any new Supreme Court precedent that might be retroactively applicable to his

In accordance with subsection (d)(2), the one-year limitation period is tolled for that portion of the period during which petitioner had pending in state court a "properly filed" post-conviction petition. In this case, petitioner's Rule 32 petition was filed on August 25, 1992, before the enactment of AEDPA, and remained pending until September 15, 2000, when the Alabama Supreme Court denied *certiorari*. Accordingly, if the Rule 32 petition was "properly filed," the *habeas* petition is timely because the time from the enactment of AEDPA until September 15, 2000, was tolled by the pendency of the Rule 32 petition, and petitioner filed the instant petition within one year after that date. If the Rule 32 petition was not "properly filed," however, the respondents' motion to dismiss is due to be granted because it had no tolling effect, and the time for filing this petition expired in April of 1997, long before the filing date of September 14, 2001.

For the reasons set forth herein, the court finds that petitioner's Rule 32 petition was not "properly filed" within the meaning of Section 2244(d)(2) and that it did not toll the running of the one-year limitation period, which began to run on April 24, 1996, and expired on April 23, 1997. The instant petition filed on September 14, 2001, more than four years past the deadline, is due to be dismissed as untimely.

In the six years since the enactment of AEDPA, the issue of whether a post-conviction petition is "properly filed" often has been examined in different contexts. Several district courts have held that state post-conviction petitions that are untimely, frivolous, or subject to a procedural bar cannot be deemed to be "properly filed" for purposes of suspending the running of the AEDPA limitation period. For example, in

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case or to the recent discovery of the factual predicate of any claim. Indeed, for any of these triggering dates to be able to save the current petition, petitioner would have to show that the triggering event occurred within one year prior to the filing of the petition on September 14, 2001. He has not done so or attempted to do so.

Valentine v. Senkowski, 966 F. Supp. 239, 241 (S.D.N.Y. 1997), the district court stated that "a post-conviction state remedy, which may be filed at any time, [may] be used to revive a right to federal relief which otherwise would be time-barred by the lapse of one year following direct appeal, thus evading the intent of the new law." To prevent the circumvention of the one-year limitations period, the court held that post-conviction petitions must be non-frivolous to be considered "properly filed" under § 2244 (d)(2). *Id.* Another judge in this court similarly held that "if a petition is found by the state courts to be barred as successive, abusive, or untimely, it would not toll the time limitation of § 2244 (d)(1)." *See, e.g., Ivory v. Mitchell*, in the District Court for the Northern District of Alabama, CV-98-AR-3003-S, October 26, 1999 (emphasis added).

The Eleventh Circuit Court of Appeals also has concluded that several types of procedural defaults may preclude a state post-conviction petition from being "properly filed" for federal limitation purposes. In particular, in early 2000, the Eleventh Circuit specifically held in *Webster v. Moore* that an untimely state post-conviction petition is not "properly filed" and thus does not toll AEDPA's statute of limitation. 199 F.3d 1256, 1258 (2000).

Several months later, the United States Supreme Court addressed a similar but distinct issue in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). In *Artuz*, the Court affirmed the Second Circuit Court of Appeals and determined that a state post-conviction petition that contained claims that were procedurally barred was nonetheless "properly filed." In reaching its conclusion the Court noted:

> An application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, **the time limits upon its delivery**, the court and office in which it must be lodged, and the requisite filing fee.

Artuz, 121 S. Ct. at 363-64 (emphasis added). The Supreme Court's conclusion is consistent with the Eleventh Circuit Court of Appeals' decision in *Webster* because the court noted that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz*, 121 S. Ct. at 364. "Claims" within a state post-conviction petition may be defaulted while others are not, but the timeliness of the filing of the application affects the entire petition, not the separate, individual claims within it. Thus, while a petition containing procedurally defaulted claims, nonetheless, may be a "properly filed application," an untimely filed petition is not a "properly filed application."[9]

Post-*Artuz*, other circuit courts of appeal have recognized that an untimely post-conviction proceeding is not "properly filed" for purposes of tolling the statute of limitations. *See, e.g.*, *Raslin v. Randle*, 2001 WL 523530 (6th Cir. May 8, 2001) (holding, in an unpublished opinion, that "untimely state collateral attacks are not properly filed and do not toll the statute of limitations"); *Outlaw v. Sternes*, 233 F.3d 453, 456 (7th Cir. 2000) (citing footnote 2 of *Artuz* in concluding that untimely state post-conviction petition is not "properly filed"). *But see Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001) (holding that if a state's rule governing timely commencement of a post-conviction petition contains exceptions that require the state court to examine the merits of a petition before dismissing it as untimely, an untimely petition may be "properly filed" for purposes of tolling AEDPA's statute of limitation).

Pre-*Artuz* opinions also have concluded that untimely filed state petitions do not toll the limitation. *Villeqas v.*

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[9] The court notes, although recognizing that there is no precedential value in the fact, that the United States Supreme Court denied *certiorari* in *Webster* just six days after deciding *Artuz*. 531 U.S. 991, 121 S. Ct. 481, 148 L. Ed. 2d 454 (2000).

Johnson, 184 F.3d 467, 469-79 and n.2 (5th Cir. 1999) (pre-*Artuz* opinion holding that a successive state court post-conviction petition is not properly filed, but explaining that a properly filed application for purposes of § 2254 (d)(2) "is one that conforms with a state's applicable procedural filing requirements," which may include the time and place of filing); *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) (pre-*Artuz* determination that petition must meet rules governing time and place of filing in order to be deemed properly filed).

A few months after *Artuz* was decided, the Eleventh Circuit Court of Appeals again examined the issue of an untimely filed Florida state court post-conviction motion. In *Delancy v. Florida Department of Corrections*, 246 F.3d 1328, 1331-32 (2001), the circuit court of appeals held that the district court's dismissal of a federal *habeas* petition as time-barred was due to be reversed. The reasoning of the opinion is somewhat like the Ninth Circuit's in *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9fh Cir. 2001). In *Delancy*, the petitioner had filed a second post-conviction motion under Florida Rule of Criminal Procedure 3.850, which he asserted acted to toll the § 2244 (d)(1) statute of limitation. The district court ruled that the second motion did not toll the deadline because the second motion was filed more than two years after his conviction became final, and thus was time-barred by Florida Rule of Criminal Procedure 3.850(b). *Id.* The Eleventh Circuit reversed, finding that the motion alleged newly discovered evidence, which, under Florida's rule, provided an exception to the two-year limitations period. *Id.* at 1331-32. Thus, as in *Dictado*, whether a state post-conviction petition is timely depends upon state law, and if state law provides an exception to the usual limitation period applicable to the petition, it may not be untimely under state law and may be "properly filed" for federal *habeas* limitation purposes.

In *Hurley v. Moore*, 233 F.3d 1295 (11th Cir. 2001), the Eleventh Circuit Court of Appeals again reviewed the district

court's treatment of a time-barred petition for writ of *habeas* corpus. In *Hurley*, the petitioner filed his first state post-conviction motion within the state-law time frame, but failed to include a written oath as required by the state law. The state court denied the petition without prejudice, permitting petitioner to refile a timely, properly sworn motion. Instead of refiling a properly sworn motion, the petitioner moved for rehearing, which was denied. He then appealed the denial, which was affirmed. *Id.* at 1298. By the time Hurley later filed a second, properly sworn post-conviction motion, it was denied as untimely. *Id.* In his federal *habeas* action, the district court dismissed the petition as time-barred. On appeal, petitioner argued that his § 2254 motion was timely because his first state post-conviction motion was properly sworn. The Eleventh Circuit Court of Appeals held that his § 2254 motion could be considered timely only if the first post-conviction motion could be deemed "properly filed." The court further held that the motion, which did not contain the oath required by Florida law, was not properly filed and did not toll the running of the one-year limitation. *Id.*

A fair reading of the cases cited above is that the Eleventh Circuit Court of Appeals has determined that, consistent with *Artuz*, successive state court post-conviction petitions are "properly filed" and toll the statute of limitation, but that untimely or unsworn petitions are not "properly filed" and do not toll the limitation, unless the state court declines to apply the time-bar in favor of considering the merits, or unless the state court is required to delve into the merits of the claims in order to resolve the issue of whether the state-law time-bar applies. In the *habeas* petition filed by this same petitioner in relation to his other death-penalty case, *Siebert v. Haley*, 193 F. Supp. 2d 1260 (2002), this conclusion compelled the District Court for the Middle District of Alabama to hold that a post-conviction motion must meet state filing deadlines to be "properly filed." *Id.* at 1264.

Any questions as to whether a post-conviction motion must be timely filed in order to toll AEDPA's one-year period were definitively decided by the Eleventh Circuit Court of Appeals in *Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). In *Drew*, the petitioner sought *habeas* relief following the dismissal in the state courts of his third post-conviction motion. The federal *habeas* action was clearly untimely unless the third post-conviction motion triggered the tolling provision of Section 2244 (d)(2). The court in *Drew* noted that the third motion did not allege facts that were previously unknown and unascertainable through due diligence; nor did the petitioner allege any facts relevant to any statutory exception to Florida's filing deadline for a post-conviction motion. Accordingly, the post-conviction motion was untimely under Florida law, and therefore was not "properly filed" as required to toll AEDPA's statute of limitations. *Id.* at 1284. The court of appeals explained:

> In this case, there is no doubt that Drew filed his third Rule 3.850 motion well over two years after his conviction became final. Prior to *Artuz*, this Court held in *Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000), that claims considered procedurally barred under state law for reasons such as untimeliness were not properly filed and could therefore not toll the AEDPA statute of limitations. *Webster* remains valid today. According to *Artuz*, a petition is not "properly filed" if it is not filed in compliance with "the time limits upon its delivery." 531 U.S. at 8, 121 S. Ct. at 364. In a footnote, the Supreme Court explicitly left open 'the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.* at 9 n.2, 121 S. Ct. at 364 n.2 (citing *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000)).

Id. at 1284-5. Consequently, the federal appellate court affirmed the district court's dismissal of the habeas action as untimely.

In this case, petitioner filed his post-conviction motion in the state trial court on August 25, 1992. Upon motion of the respondents, the trial court dismissed the petition as untimely pursuant to Rule 32.2(c), noting that the certificate of judgment following petitioner's direct appeal was issued by the Alabama Court of Criminal Appeals on May 22, 1990, making any Rule 32 petition filed later than May 21, 1992, untimely.[10] The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied *certiorari* on September 15, 2000. Thus, the state courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed. Although the trial court examined petitioner's Rule 32 claims on the merits in addition to finding the claims time-barred, the Alabama Court of Criminal Appeals expressly held that the trial court should not have addressed the barred claims on the merits, as such an examination is not permitted by the Alabama rule. The petition contained no allegations of newly discovered evidence that might trigger the six-month exception to the two-year rule. In his appeal from the denial of his Rule 32 petition as untimely, petitioner did not assert that he was entitled to an extended deadline in accordance with Alabama Rule of Criminal Procedure 32.2(c) because his claims were premised upon newly discovered evidence.[11] Accordingly, this court is compelled, pursuant to *Artuz* and *Drew*, to conclude that the untimely state petition was not a "properly filed application" capable of tolling the limitation period and to dismiss petitioner's *habeas* petition as time-barred under § 2244(d)(1).

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[10] Alabama Rule of Criminal Procedure 32.2(c) in effect at the time governing petitioner's motion prescribed a limitation period requiring any Rule 32 petition to be filed "within two years after the issuance of the certificate of judgment by the Court of Criminal Appeals."

[11] The Alabama rule contains a provision similar to the Florida rule at issue in *Delancy* that provides that petitions based upon newly discovered evidence may be filed within the two-year period, or within six months of the time the new evidence is discovered, whichever is later.

III. EQUITABLE TOLLING

Petitioner does not specifically argue that his petition should not be viewed as time-barred based on the doctrine of equitable tolling, but petitioner does assert that the Alabama Court of Criminal Appeals failed to notify him when it issued the certificate of judgment, instead sending a copy to the trial court only. He further asserts that he was attempting to exhaust his state court remedies in accordance with the federal court's exhaustion requirements of 28 U.S.C. § 2254(b)(1)(A) and (c). The court views these assertions as arguments in favor of equitable tolling.

The Eleventh Circuit Court of Appeals has recognized that the limitation period under § 2244(d)(1) may be equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F. 3d 1269, 1271 (11th Cir. 1999). The court went on to note that equitable tolling is an "extraordinary remedy" and cautioned that it is to be "applied sparingly." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citing *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990)). Other circuits likewise have restricted the use of equitable tolling to instances that are "extraordinary," "rare," and "beyond the control" of the petitioner. *See Wyzykowski v. Department of Corrections*, 226 F. 3d 1213, 1216, n.1 (11th Cir. 2000), and cases cited therein.

Petitioner has failed to demonstrate the "extraordinary circumstances" that would compel the court to apply equitable tolling. In sum, petitioner contends that he was not affirmatively informed of the issuance of the certificate of judgment, which triggered the running of the two-year statute of limitations. Petitioner further argues that his failure to meet the one-year deadline for filing the federal *habeas* petition was a result of his compliance with federal *habeas* law requiring him to exhaust state court remedies before

filing his *habeas* petition. Neither of these arguments is worthy of merit.

Even assuming petitioner's assertions are true and that petitioner was unaware that the certificate of judgment had issued, he does not contend that he made any effort to determine the status of his case. He also does not argue that he was unrepresented by counsel or that the information available at the trial court or appellate court was unavailable to him. At the time the Supreme Court denied his petition for *certiorari* on direct appeal (November 5, 1990), petitioner could have determined the deadline for filing a Rule 32 petition simply by reading the plain language of Rule 32.2(c) and contacting the Court of Criminal Appeals to discover the date on which the certificate of judgment was entered. He apparently did neither. Equitable tolling, furthermore, is not applicable in this case because petitioner was on notice, no later than April 4, 1995, when the state amended its answer to include the statute-of-limitations defense, that the state court considered his Rule 32 petition to be untimely.[12] Petitioner had actual notice of the defect in his Rule 32 filing, and the assertion of time-bar defense should have alerted him to the fact that his filing might not be considered "properly filed" for tolling purposes under the AEDPA time limitation. A petitioner exercising the diligence required would have filed his federal *habeas* action within the one-year grace period out of caution, even if he continued to contest the timeliness issue in the state courts.

Petitioner has failed to demonstrate that he took any steps to diligently pursue his claims as required by the doctrine of equitable tolling. *See Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1314 (11th Cir. 2001).

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[12] Moreover, there is no requirement that petitioner know his post-conviction motion is time-barred in order to activate the running of the statute of limitations, only that the petition actually be time-barred. *See, e.g., Siebert v. Haley*, 193 F. Supp. 2d 1260, 1265 (M.D. Ala. 2002), and *Hoggro v. Boone*, 150 F.3d 1223 (10th Cir. 1998), cited therein.

Because petitioner failed to make any showing of the requisite diligence, he is not entitled to equitable tolling based on the assertion that he did not receive a copy of the certificate of judgment.

Petitioner's argument that the statute of limitation should be tolled because he was attempting to exhaust his state court remedies likewise is without merit. Petitioner was free to file a federal *habeas* petition even while pursuing his state court proceedings. He could have avoided the problem he now faces by filing his federal *habeas* petition in a timely manner during the one-year grace period, and then moving that the petition be stayed during the pendency of the Rule 32 petition.

Petitioner has failed to show that any "extraordinary circumstances" that were "beyond his control" prevented him from timely filing the instant petition. Accordingly, the statute of limitation is not due to be equitably tolled, and the instant petition is due to be dismissed as untimely.

IV. DEFERENCE

Petitioner presented his arguments relating to the timeliness of his Rule 32 petition in his appeal from the denial of the petition by the trial court, and the Alabama Court of Criminal Appeals addressed the issue on the merits. A federal court generally is required to defer to a state court's application of its own filing deadlines. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000).

Petitioner argues that the state court's ruling that the Rule 32 petition was untimely is not due deference by this court because the filing deadline: (1) was neither clear nor well established at the time he filed his Rule 32 petition, and (3) was not consistently applied. Neither of these contentions warrants disregarding the state court finding of untimeliness of the Rule 32 petition.

A. Clear and Well Established

Petitioner first contends that the time limitation of Rule 32.2(c) was unclear and not well established. Prior to August 1, 2002,[13] Rule 32.2(c) stated:

> Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on grounds specified in Rule 32.1 (a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala. R. App. P.; or (2) In the case of a conviction not appealed to the Court of Criminal Appeals, within two (2) years after the time for filing an appeal lapses. The court shall not entertain a petition based on the grounds specified in Rule 32.1 (e) unless the petition is filed within the applicable two-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the two-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.

Ala. R. Crim. Pro. 32.2(c). The rule clearly dictates that the post-conviction petition must be filed within two years after the certificate of judgment is issued by the Court of Criminal Appeals. Rule 32.2(c) is in no way unclear, and petitioner does not assert that the language of the rule is unclear. Petitioner argues that his conviction did not become "final" until the United States Supreme Court denied *certiorari* on

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[13] On August 1, 2002, Rule 32.2(c) was modified to shorten the time for filing a petition to one year. Otherwise, the text of the rule remains unchanged from what it has been since it was first adopted as Temporary Rule 20.2(c) in 1987.

November 5, 1990. Thus, petitioner asserts, there was no "final" disposition of his case, and the certificate of judgment should not have been issued, pursuant to Alabama Rule of Appellate Procedure 41(b). Alabama Rule of Appellate Procedure 41, provides:

> **(b) Stay of Certificate of Judgment Pending Petitions for Certiorari to Courts of Appeals.** The timely filing of a petition for certiorari in the Supreme Court shall stay the issuance of the certificate of judgment by the courts of appeals, which stay shall continue until the final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for certiorari, the certificate of judgment of the courts of appeals shall issue immediately. If the time for the issuance of the certificate of judgment shall have been shortened pursuant to subdivision (a) hereof, the court of appeals shall grant such relief, upon motion, as may be appropriate.

Ala. R. App. P. 41(b). Petitioner argues that the certificate of judgment rendered in his case should not govern the timeliness issue because he had applied for *certiorari* with the United States Supreme Court, which had not yet been denied. Thus, petitioner asserts there had been no "final disposition" of his case as required in Rule 41(b).

Petitioner presented this same argument to the Alabama Court of Criminal Appeals, which determined that it was clear that "Siebert's conviction became final on the date the Alabama Court of Criminal Appeals issued the certificate of judgment ...." *Siebert v. State*, 778 So. 2d 842 (Ala. Crim. App. 1999). Petitioner does not dispute that the "final disposition" required by Rule 41(b) clearly references the disposition of the case by the Alabama Supreme Court, not

the United States Supreme Court.[14] Not only does the language of the Rule so indicate, but the practice of the Alabama Court of Criminal Appeals has been to issue the certificate of judgment upon completion of the review in the Alabama Supreme Court, regardless of whether an appeal is then made to the United States Supreme Court. Accordingly, this argument is without merit.

Petitioner next argues that the two-year limitation for the filing of Rule 32 petitions was not "well established" at the time petitioner filed his Rule 32 petition. The two-year limitation period for filing a petition for post-conviction relief in Alabama took effect less than two weeks after petitioner was convicted, and about two weeks before petitioner was sentenced. *See* Ala. R. Crim. P. Temporary Rule 20.2(c), enacted April 1, 1987.[15] *See also Eddins v.*

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[14] The Alabama Supreme Court addressed this issue recently in *Ex parte Hutcherson*, 2002 WL 960044, __ So. 2d __ (Ala., May 10, 2002). In *Hutcherson*, the petitioner, a death penalty inmate, had filed an out-of-time Rule 32 petition based on his attorney's belief that the two-year period began to run after review by the United States Supreme Court, rather than upon issuance of the certificate of judgment by the Alabama Court of Criminal Appeals. *Id.* The issue before the court was whether a writ of *mandamus* issued by the Alabama Court of Criminal Appeals directing the trial court to grant the motion to dismiss the Rule 32 petition as untimely was appropriate for *mandamus* relief. In a dissenting opinion, however, Justice Stuart noted that Rule 32 "specifically provide[s] that the time runs from the issuance of a certificate of judgment by the Court of Criminal Appeals." *Id.* at *6.

[15] The rule states:

> (c) STATUTE OF LIMITATIONS. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 20.1(a) and (f), unless the petition is filed (1) In the case of a conviction appealed to the court of criminal appeals, within two years after the issuance of the certificate of judgment by the court of criminal appeals under Rule 41, Alabama Rules of Appellate Procedure .... Provided, however, that the two-year period during which a petition may be brought shall in no case be deemed to have begun to run

State, 555 So. 2d 323 (Ala. Crim App. 1989). By the time petitioner's conviction became "final" by the conclusion of his direct appeal in November of 1990, the rule had been in effect for more than three years.

Petitioner's argument is premised on *Daniels v. State*, 650 So. 2d 544 (Ala. Crim. App. 1994). Petitioner argues that in *Daniels*, the court did not question the timeliness of the Rule 32 petition because it was filed within two years after the United States Supreme Court denied *certiorari*. Petitioner's argument misstates both the history of the case and the proposition for which the case stands.

In *Daniels*, the defendant was convicted of capital murder and was sentenced to death in 1978. He appealed to the Alabama Court of Criminal Appeals, which in 1980 reversed and remanded for new trial. The United States Supreme Court in 1982 vacated the Alabama Court of Criminal Appeals' decision and remanded for further consideration in light of *Hopper v. Evans*, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982). Following remand, the Alabama Court of Criminal Appeals determined that the defendant was not entitled to a new trial and affirmed the conviction in 1985, but vacated the death sentence and remanded for re-sentencing. *See Daniels*, 534 So. 2d at 658. Defendant was resentenced, and he appealed the new sentence, which was affirmed by the Alabama Court of Criminal Appeals on October 13, 1987. *Id.* The Alabama Supreme Court affirmed the conviction on September 30, 1988, in *Daniels v. State*, 534 So. 2d 664 (Ala. 1988), and the United States Supreme Court denied *certiorari* review by order dated January 23, 1989. *Daniels v. Alabama*, 488 U.S. 1051, 109 S. Ct. 884, 102 L. Ed. 2d 1007. The defendant filed his Rule 32 petition on March 20, 1990.

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before the effective date of this Temporary Rule 20 (April 1, 1987).

Ala. R. Crim. P. 20.2(c) (1987).

The petitioner has not provided any evidence as to when the Alabama Court of Criminal Appeals issued its certificate of judgment in *Daniels*, but the applicable provisions of Rule 41 would require that the certificate of judgment be issued after the Alabama Supreme Court denied certiorari on September 30, 1988. The defendant in *Daniels* filed the Rule 32 petition at issue in the case cited by petitioner on March 20, 1990, approximately 18 months after the certificate of judgment was due to be issued, and well within the two-year statute of limitations. Accordingly, *Daniels* cannot be read to stand for the proposition that the limitations period prescribed by Rule 32.2(c) or its predecessor, Temporary Rule 20.2(c), is not "well established." To the contrary, Alabama case law is replete with examples through the years since the rule was enacted in which the Alabama courts have strictly enforced the two-year limitation for filing petitions for post-conviction relief. *See, e.g., Dowdell v. State*, 2002 WL 1398002 (Ala. Crim. App. June 28, 2002); *Kaska v. State*, 709 So. 2d 500 (Ala. Crim. App. 1997); *Rahman v. State*, 563 So. 2d 50 (Ala. Crim. App. 1990); *Cochran v. State*, 548 So. 2d 1062 (Ala. Ct. App. 1989). The petitioner has not demonstrated that there have been any cases in which the respondents raised the issue of time-bar and the court chose not to apply the limitations period.[16] Finally, petitioner further asserts that the application of the time-bar "would make no sense" because judicial economy and efficiency weigh against a requirement that petitioner litigate both his direct appeal in the United States Supreme Court and his Rule 32 petition in the state court at the same time. While this argument may fairly be addressed to those who enacted

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[16] The court agrees that there have been instances in which the state failed to raise the time limitation as a defense and the courts chose not to address the time bar issue or found that the time-bar had been waived, but such instances do not compel a conclusion that the clear mandate of Rule 32 was not well established. Furthermore, there are instances early in the history of the two-year time-bar in which courts recognized that Rule 20's limitation must be strictly applied. *See, e.g., Eddins v. State*, 555 So. 2d 323 (Ala. Crim. App. 1989).

the time limitation, the court is bound to do not what the parties argue is "sensible," but what the prevailing law expressly requires.[17] Accordingly, petitioner's argument that the two-year limitation was not "well established" is without merit.[18]

B. Consistently Applied

Petitioner argues that the two-year bar has not been consistently applied, and he points the court to two cases in which the Rule 32 petitions were filed more than two years after the certificate of judgment was issued, but less than two years after the United States Supreme Court denied *certiorari*. *Callahan v. State*, 767 So. 2d 380 (Ala. Crim. App. 1999); *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999). An examination of those cases does indicate that the Rule 32 petitions at issue were time-barred; however, there is no indication in any of the evidence presented to this court or in the opinions that the state ever raised the issue of the time-bar, or that the court ever considered the timeliness of the petitions.

This same argument was presented by Siebert in his *habeas* petition filed with the Middle District of Alabama in connection with his capital murder convictions arising from the slaying of the Weathers family. That court noted: "[T]he court is not aware of any cases in which Alabama courts declined to enforce the statute of limitations where the defense was expressly raised as to claims to which the statute of limitations applied." This court agrees. The fact that in

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[17] One of the cases cited by petitioner points out that, under Rule 32, a petitioner can file a post-conviction petition even while the appeal of his conviction is pending, because Rule 32.6 provides that "[a] petition may be filed *at any time* after entry of judgment and sentence." *Barnes v. State*, 621 So. 2d 329 (Ala. Crim. App. 1992).

[18] Although petitioner does not raise the argument that the time-bar should not apply because he is subject to the death penalty, it should be noted the Alabama courts have definitively stated that the procedural bars of Rule 32 apply with equal force in capital cases. *See, e.g., State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

two instances the state failed or declined to raise the issue of the time-bar and the court failed or declined to *sua sponte* examine the timeliness issue does not constitute the kind of "inconsistency" that would overcome the requirement that a federal court give deference to the state rule. *Dugger v. Adams*, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 575 (1988) (recognizing that a rule is consistently applied where a vast majority of the cases apply the procedural bar); *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). In this case, the petitioner has pointed to only two cases in which the time-bar was not applied, and in those cases the state did not assert and the court did not examine the issue of timeliness. On the other hand, the court is aware of many cases in which the time-bar was applied. Accordingly, the court concludes that petitioner's argument that the time-bar was not "consistently applied" is without merit.

CONCLUSION

Accordingly, for the reasons stated above, the court finds that the petition for writ of *habeas corpus* under 28 U.S.C. § 2254 is due to be dismissed with prejudice as time-barred by 28 U.S.C. § 2244(d). Petitioner, with the assistance of counsel, waited until September 2001 to file the instant *habeas* petition, well more than five years after the limitation period was enacted in 1996. The Rule 32 petition pending at the time AEDPA became law did not act to toll the running of the limitation period under § 2244(d)(2), because it was found to be itself untimely under Alabama state law and procedure, a finding this court must respect. Being untimely itself, the Rule 32 petition was not a "properly filed application" within the meaning of § 2244 (d)(2), such that it could toll the running of the federal limitation period. *See Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002). Further, no "extraordinary circumstances" exist that justify the equitable tolling of the limitation.

By separate order, the court will GRANT the respondents' motion to dismiss the instant petition with prejudice.

DATED this 30 day of September, 2002

/s/ Inge P. Johnson
INGE P. JOHNSON
UNITED STATES DISTRICT JUDGE

Siebert v. Campbell
C.A.11 (Ala.), 2003.

United States Court of Appeals, Eleventh Circuit.
Daniel SIEBERT, Petitioner-Appellant,
v.
Donal CAMPBELL, Commissioner, Alabama Department of Corrections, Charlie E. Jones, Warden, William H. Pryor, Jr., The Attorney General of the State of Alabama, Respondents-Appellees.

Daniel Siebert, Petitioner-Appellant,
v.
Donal Campbell, Commissioner, Alabama Department of Corrections, Respondent-Appellee.
Nos. 02-13685, 02-15890.

June 23, 2003.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Daniel Siebert appeals from the dismissal of his petitions for habeas corpus under 28 U.S.C. § 2254. Although his case reaches us some eleven years after he first sought collateral review of his convictions and sentences of death, the courts have to date determined only that he is subject to procedural bars and therefore have never allowed the merits of his claims to control.[1] The district courts dismissed Siebert's petitions on the ground that they were untimely

[1] Alabama's courts commented on the merits of Siebert's claims, but only as an alternative ground of decisions that also held his petitions untimely. *See Siebert v. State,* 778 So. 2d 842, 846 (Ala. Crim. App. 1999) (describing ruling of Lee County Circuit Court as "disposing of the claims in the petitions as procedurally barred, but nonetheless also disposing of these claims on their merits"); *id.* (commenting that "Siebert received a fair trial"). It cannot be said that the courts allowed the merits to control in taking this approach.

under the one year statute of limitations established by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), now codified at 28 U.S.C. § 2244(d)(1). Siebert had argued that the one-year deadline did not bar his petitions because a separate AEDPA provision, 28 U.S.C. § 2244(d)(2), tolled the limitations period for the time during which his "properly filed" applications for post-conviction relief were pending in the Alabama courts.

Because state courts had held in these proceedings that Siebert had missed the expiration of Alabama's own post-conviction statute of limitations, the district courts concluded that Siebert's state petitions were not "properly filed" and that AEDPA's tolling provision thus did not apply. The question before us is therefore whether Siebert's Alabama petitions, which were accepted by the courts but ultimately found to have been filed late, should be considered "properly filed" within the meaning of AEDPA's tolling provision and the Supreme Court's interpretation of that term in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000).

BACKGROUND

Siebert was tried in two separate prosecutions, one in Talladega County (for the murder of Linda Jarman) and one in Lee County (for the murder of Sherri Weathers and her two minor sons). He was found guilty of all charges, and at the end of each of his trials he was sentenced to death, twice. Siebert appealed his two convictions and sentences to the Alabama Court of Criminal Appeals, which issued separate decisions addressing different challenges Siebert had raised in each case. The Alabama Supreme Court subsequently denied relief, publishing its own analysis of many of Siebert's claims in the Lee County case, *Ex parte Siebert*, 555 So. 2d 780 (Ala. 1989), as well as a summary statement in the Talladega County case announcing that it had found "no error or defect in the proceedings that adversely affected the rights of the defendant." *Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990). Siebert petitioned the United States

Supreme Court for *certiorari* but was denied review separately in each case in 1990.

In 1992 Siebert filed the two petitions that are relevant here, challenging his Lee County and Talladega County convictions and sentences separately in each county's circuit court under Rule 32 of the Alabama Rules of Criminal Procedure. The state responded with separate answers in the months following each of Siebert's petitions, conceding that Siebert was entitled to an evidentiary hearing on his claim that counsel had provided ineffective assistance. The petitions were consolidated for an evidentiary hearing in the Lee County Circuit Court. After Siebert filed amendments to both petitions on March 29, 1995, the trial court commenced hearing evidence on April 3, 1995.

The next day, the state asserted for the first time that Siebert's applications were barred because he had failed to meet the two-year statute of limitations then generally applicable to most post-conviction claims in Alabama.[2] After continuing to take evidence on April 4 and 5, as well as on September 26, 1995 and January 21, 1997, the circuit court adopted the state's proposed, 87-page memorandum opinion as its final judgment, denying Siebert relief on a variety of substantive and procedural grounds. Among the many findings of the circuit court was its determination that relief was precluded by Rule 32's statute of limitations.

The Court of Criminal Appeals affirmed, finding no merit in Siebert's argument that the two-year statute of limitations set forth in Ala. R. Crim. P. 32.2(c) must be raised as an affirmative defense in the state's first responsive pleading. *Siebert v. State,* 778 So. 2d 842, 847-48 (1999). The court distinguished two earlier Alabama cases holding the state to have waived the limitations defense, reading them as addressing only the circumstance in which the state raises the

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[2] The statute of limitations – which is actually codified not by statute but by an Alabama Supreme Court rule – was later shortened to one year by an order effective August 1, 2002.

defense for the first time on appeal. *Id.* Noting that Siebert had been allowed to amend his petitions on March 29, 1995, five days before the evidentiary hearing, the court reasoned that the state was properly allowed to do the same within a reasonable time. *Id.* at 848 (adopting portion of circuit court's opinion).

On September 14, 2001, Siebert filed two different federal habeas petitions, one in the Middle and one in the Northern District of Alabama. Both district courts held his petitions untimely under AEDPA because they were not filed within a year of that statute's effective date. The district court decisions, although accepting the premise that a state time bar must be firmly established and regularly followed to render a late petition improperly filed, nonetheless rejected Siebert's claim that the Alabama statute of limitations failed to meet this standard. The district court decisions also declined to apply the doctrine of equitable tolling on Siebert's behalf. Both district courts thereafter granted Siebert certificates of appealability.[3]

DISCUSSION

Under 28 U.S.C. § 2244(d)(1), persons in custody pursuant to a judgment of a state court may file petitions for habeas corpus within one year of any of four dates specified by the statute.[4] Because Siebert's convictions became final

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[3] The certificate of appealability granted by the Middle District of Alabama followed its denial of Siebert's motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment denying habeas relief, as well as a subsequent grant of Siebert's motion to reopen the time for taking an appeal. The state argues on appeal that only the denial of Siebert's Rule 59 motion, not the underlying dismissal of his habeas petition, is before this Court. We reject this argument in light of the procedural history recounted by the district court in its order reopening the time for taking an appeal, as well as its grant of a certificate of appealability as to both its Rule 59 order and the underlying habeas dismissal.

[4] In addition, equitable tolling of the limitations period is in some instances appropriate under circumstances not encompassed by the statutory exceptions to the time bar. *See Drew v. Department of Corrs.,*

prior to the effective date of AEDPA, he had until April 23, 1997 to file a federal habeas petition. *Wilcox v. Florida Dept. of Corrs.*, 158 F.3d 1209, 1210 (11th Cir. 1998). Siebert did not file until September 14, 2001. He argues, however, that the one-year statute of limitations does not bar his petitions because AEDPA also provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). Siebert's entitlement to have the limitations period tolled thus depends on whether his applications for state post-conviction review under Ala. R. Crim. P. 32 were "properly filed." If they were, his federal habeas petitions are not untimely because the federal limitations period would have been tolled from April 24, 1996 until September 15, 2000, the date on which the Alabama Supreme Court denied review. Since Siebert filed on September 14, 2001, he will have met the one-year deadline.

I. "Properly Filed" Inquiry Under AEDPA's Tolling Provision

The first round of jurisprudence construing the meaning of "properly filed" produced a circuit split. A majority of circuits determined that an application for post-conviction relief could be "properly filed" even if claims asserted therein were procedurally barred or otherwise meritless. *Habteselassie v. Novak*, 209 F.3d 1208, 1211 (10th Cir. 2000) ("affirmative defenses that preclude a court from granting relief on the merits, as opposed to pure filing requirements, require analysis in some manner of the substance of the claims set forth by the petitioner and do not

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297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237, 123 S. Ct. 1364, 155 L.Ed.2d 205 (2003).

prevent a motion from being 'properly filed' for purposes of § 2244(d)(2)"); *Bennett v. Artuz,* 199 F.3d 116, 122 (2d Cir. 1999) (declining "to engraft a merit requirement into § 2244(d)(2) without some indication of congressional intent to do so") (internal quotation marks and citation omitted), *aff'd,* 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000); *Villegas v. Johnson,* 184 F.3d 467, 469 (5th Cir. 1999) (criticizing authorities that "have offered little analysis to support their conclusion that the phrase 'properly filed' connotes some measure of merit"); *Lovasz v. Vaughn,* 134 F.3d 146, 149 (3d Cir. 1998) (rejecting "the notion that a meritless PCRA petition cannot constitute 'a properly filed application' under § 2244(d)(2)").

Two other circuits, however, held that applications containing claims barred under state procedural rules are not "properly filed," regardless of whether a procedural bar constituted a filing requirement *per se.* *Dictado v. Ducharme,* 189 F.3d 889, 892 (9th Cir. 1999) (defining "'properly filed application' to mean an application submitted in compliance with the procedural laws of the state in which the application was filed"); *Tinker v. Hanks,* 172 F.3d 990, 991 (7th Cir. 1999) (holding that state "screening mechanisms ... determine when an application for postconviction relief is proper (as in 'properly filed')"). This circuit aligned itself with the view of the Seventh and Ninth Circuits. *See Weekley v. Moore,* 204 F.3d 1083, 1086 (11th Cir. 2000) (holding that failure to comply with "procedural requirement forbidding successive motions" rendered petition improperly filed because "we are persuaded by the reasoning" of *Dictado* and *Tinker*); *but see id.* at 1086 (Barkett, J., dissenting) (criticizing majority's interpretation as "in direct conflict with the plain meaning of the phrase 'properly filed'" as used in AEDPA's tolling provision).

In *Artuz v. Bennett,* 531 U.S. 4, 121 S. Ct. 361, 148 L.Ed.2d 213 (2000), the Supreme Court unanimously rejected the broader approach followed by the Seventh and

Ninth Circuits and in our own *Weekley* decision. Instead, the Court held that an application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing *filings*." *Id.* at 8, 121 S. Ct. 361 (emphasis supplied). Contrasting a "condition to filing" with a "condition to obtaining relief," the Court concluded that non-compliance with conditions to obtaining relief does not prevent a habeas petitioner's state application from being "properly filed." *Id.* at 11, 121 S. Ct. 361. On this ground it ruled against the state, which had argued that a post-conviction application was improperly filed because it failed to comply with two New York procedural bars, one precluding claims that were determined on the merits on appeal and the other precluding claims not raised on appeal due to "unjustifiable failure."

The Court approvingly cited decisions from the courts of appeals distinguishing between the "properly filed" inquiry and a state court's determination that claims were procedurally barred. *Id.* at 8, 121 S. Ct. 361 (citing *Habteselassie*, 209 F.3d at 1210-11, and *Villegas*, 184 F.3d at 469-70). It also independently reversed those courts, including this one, that had interpreted the "properly filed" provision to require compliance with procedural bars generally. *See Weekly v. Moore*, 531 U.S. 1063, 121 S. Ct. 751, 148 L.Ed.2d 654 (2001);[5] *Tinker v. Hanks*, 531 U.S. 987, 121 S. Ct. 476, 148 L.Ed.2d 450 (2000).[6] On remand of our *Weekley* decision, we read *Artuz* to dictate a result opposite the one we had previously reached. *Weekley v.*

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[5] The United States Reports misspell petitioner Jeffrey Weekley's name in captioning the Supreme Court order vacating our opinion.

[6] In the third court of appeals case requiring petitioners' applications to be free of procedural bar, the Ninth Circuit had held its mandate pending the Supreme Court's decision in *Artuz*. *See Dictado v. Ducharme*, 244 F.3d 724, 725 (9th Cir. 2001). After the Supreme Court handed down its decision, the Ninth Circuit withdrew its earlier opinion and published a new opinion finding the petitioner's state application properly filed. *Id.* at 725, 728.

Moore, 244 F.3d 874 (11th Cir. 2001) ("*Weekley II*"). Thus, we ultimately held that a Florida prisoner's post-conviction motions were "properly filed" even though the Florida courts had dismissed them as successive. Other courts have likewise recognized *Artuz* to define the term "properly filed" in a manner that calls for an inquiry distinct from state courts' own application of state rules governing post-conviction petitions. *See, e.g., Pratt v. Greiner*, 306 F.3d 1190, 1192, 1195 (2d Cir. 2002) (holding that "even if Pratt's state court motion relied on a forged document, it still was 'properly filed' under AEDPA," since federal "courts, on habeas review, should not scrutinize the legitimacy of state court filings to determine whether they were 'properly filed' within the meaning of § 2244(d)(2)").

Neither the Supreme Court's *Artuz* decision nor our own *Weekley* decisions directly addressed non-compliance with a state post-conviction statute of limitations. Prior to *Artuz*, however, we had held that an application must meet state filing deadlines in order to toll the AEDPA statute of limitations. *Webster v. Moore*, 199 F.3d 1256, 1258 (11th Cir.), *cert. denied*, 531 U.S. 991, 121 S. Ct. 481, 148 L.Ed.2d 454 (2000).[7] Nonetheless, we recognized out-of-circuit authority holding that the tolling provision does not require compliance with "more complex state procedural doctrines relating to timeliness or repetitiveness." *Id.*

Our inquiry in *Webster* lacked the guidance provided by the Supreme Court's discussion in *Artuz* of the meaning of "laws and rules governing filings." The Court gave some content to this phrase by discussing several qualifying examples and then setting forth a broad distinction:

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[7] In *Webster*, we presumed the limitations period established by Fla. R. Crim. P. 3.850 to be mandatory unless a prisoner met one of several narrow and specifically described exceptions enumerated by the rule. For reasons discussed *infra*, we believe the limitations period established by Ala. R. Crim. P. 32.2 was not mandatory in this sense when it was applied in Siebert's case.

> [Such rules] usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. In some jurisdictions, the filing requirements also include, for example, preconditions imposed on particular abusive filers, or on all filers generally, cf. 28 U.S.C. § 2253(c) (1994 ed., Supp. IV) (conditioning the taking of an appeal on the issuance of a "certificate of appealability"). But in common usage, the question whether an application is "properly filed" is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar.

Id. at 8-9, 121 S. Ct. 361 (emphasis in original; additional citations omitted). *See also Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 2143, 153 L.Ed.2d 260 (2002) (Kennedy, J., dissenting) (explaining that "*Artuz* ... recognized that an 'application' is a 'document' distinct from the legal claims contained within it").

In a footnote, the Court added that it would "express no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.* at 9 n. 2, 121 S. Ct. 361 (citation omitted). It did, however, cite a Fifth Circuit case holding a Louisiana prisoner's application for state post-conviction relief "properly filed" because two statutory exceptions to the state's filing deadline required a limited inquiry into particular claims. *See Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000), *cited in Artuz*, 531 U.S. at 9 n. 2, 121 S. Ct. 361. On the Fifth Circuit's view, the inquiry required to apply the exceptions meant that timeliness was more properly regarded under the Louisiana statute as a limitation on "the state court's ability to grant relief" than as "an absolute bar to filing." *Id.* As already noted, *Artuz* itself reiterated this distinction between conditions to filing and conditions to obtaining relief, though it did so in a portion of its opinion not discussing the Fifth Circuit's *Smith* decision

or timely filing requirements.

We note that the context in which *Artuz* refers to "time limits upon [a petition's] delivery" – alongside references to the form of a document, the proper court and office for filing, and fees – addresses a narrow category of rules setting forth prerequisites to the commencement of suit. Compliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular claim (or all claims). By tying the term "time limits" to "delivery," *Artuz* might be read to refer to deadlines governing *service* upon an opposing party, which, unlike timeliness, is ordinarily a prerequisite to the formal commencement of suit. The Court's discussion of time limits on "delivery" might also suggest a concern with requirements that papers be submitted within the hours of business maintained by a clerk's office.

The *Artuz* Court did not further amplify the meaning of its references to "time limits upon ... delivery" and "timely filing requirement[s]." Nor need we presently decide whether the Supreme Court's language refers only to rules addressing the mechanics of delivery, such as deadlines for service or hours for lodging papers. Because issues "pertaining to the timeliness of a prisoner's application for state post-conviction relief are not homogenous," *Habteselassie,* 209 F.3d at 1211 n. 3 (citations omitted), we believe this case is best resolved narrowly, by attending to the precise nature of the Alabama time bar applied in Siebert's post-conviction proceedings. Under Ala. R. Crim. P. 32.2(c), state courts retained discretion to address claims raised in late petitions. In the sections that follow, we first discuss the Alabama authorities that lead us to characterize the time bar, as applied in Siebert's case, in this manner. We then proceed to consider whether a discretionary statute of limitations is a "timely filing requirement" such that noncompliance prevents a state post-conviction application from being "properly filed" within the meaning of §

2244(d)(2).

II. Discretionary Application of Alabama's Post-Conviction Time Bar

The state argues that the Rule 32 statute of limitations is a jurisdictional bar that may be noticed at any stage of proceedings and always requires dismissal. This contention appears to be an accurate statement of Alabama law as it now stands. Under *Williams v. State,* 783 So. 2d 135, 137 (Ala. Crim. App. 2000), "the failure to file a Rule 32 petition within the two-year limitations period is a jurisdictional defect that can be noticed at any time and is not waived by the failure of the state to assert it."

For the purpose of applying AEDPA's tolling provision, however, our point of reference is not Alabama law as it now exists. Under the judicially developed doctrine of procedural default, *see Coleman v. Thompson,* 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977), only rules that are "firmly established and regularly followed" qualify as adequate state grounds for precluding substantive review of federal claims. *Edwards v. Carpenter* 529 U.S. 446, 450, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000); *Ford v. Georgia,* 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L.Ed.2d 935 (1991). We have not previously stated that this standard likewise applies to state procedural rules in the "properly filed" inquiry under § 2244(d)(2), but we have implied that it does. *See Webster,* 199 F.3d at 1259 & n. 4 (pausing to note, in concluding that state court ruling warranted deference in "properly filed" inquiry, that "[t]here is no contention in this case that the state court's rule is not 'firmly established and regularly followed'") (citation omitted). The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice. Accordingly, we

conclude that a rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision. For several reasons, we believe the jurisdictional character of Rule 32's time bar did not meet this standard at the time of Siebert's post-conviction proceedings.

We first note that the only case cited by the state in arguing that the Alabama statute of limitations is jurisdictional is *Williams*, which itself cited as positive authority only one decision construing the Rule 32 time bar: Siebert's own case.[8] The other precedents cited by *Williams* were four cases discussing statutes of limitation in the context of the state's prosecution of an accused. *Williams*, 783 So. 2d at 137. In our view there exists rather little analogy between statutes of limitation restricting the state's authority to initiate prosecutions and a statute of limitations restricting convicted defendants' opportunity to bring post-conviction challenges. Hence we believe that apart from Siebert's own case, the precedents cited in *Williams* were largely inapposite to its conclusion that the Rule 32 statute of limitations imposes a jurisdictional bar. The very necessity of relying on Siebert's case suggests that the jurisdictional character of the post-conviction limitations period was not

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[8] Despite the reliance placed on it by *Williams*, the decision denying Siebert relief did not discuss whether the Rule 32 statute of limitations was a jurisdictional bar. Rather, Siebert himself argued that Rule 32.2(c) was *not* jurisdictional, but the appeals court refused to address this contention because he had not addressed it to the trial court. *Siebert v. State*, 778 So. 2d 842, 847 (Ala. Crim. App. 1999). The portion of *Siebert* subsequently quoted in *Williams* concerned only the conceded authority of Alabama circuit courts to decide *sua sponte* to dismiss when "a simple reading" of the petition shows that it "is obviously without merit or is precluded." *Williams*, 783 So. at 136-37 (Ala. Crim. App. 2000) (quoting *Siebert*, 778 So. 2d at 847 (internal citation omitted)). A court's discretionary authority to dismiss an untimely petition on its own initiative is distinct from a party's authority to enforce a time bar, and it is most certainly distinct from a jurisdictional rule *requiring* a court to dismiss untimely petitions whenever their untimeliness may be noticed.

"firmly established" when *Siebert* itself was decided.

Second, we note that *Williams* expressly manifests the appeals court's awareness that it was announcing a new rule. In characterizing a failure to file within the two-year limitations period as a jurisdictional defect, the court stated that "[a]ny previous holdings to the contrary are hereby expressly overruled." *Williams,* 783 So. 2d at 137. It then cited *Howard v. State,* 616 So.2d 398 (Ala. Crim. App. 1993), as an example. In *Howard,* the court had declined to apply the statute of limitations because it found the state had not met its burden of pleading the time bar. *Id.* at 399. As *Williams* itself recognized, this treatment of the statute of limitations is in conflict with the rule that Alabama courts lack jurisdiction to entertain untimely Rule 32 petitions.

Finally, our conclusion that the jurisdictional character of the time bar was not firmly established at the time of Siebert's Rule 32 proceedings draws support from the opinions denying relief on his petitions. First, neither the circuit nor the appeals court "dismissed" the petitions, as would be the proper disposition upon a determination that no jurisdiction exists, *see, e.g., Williams,* 783 So. 2d at 137; rather, both courts considered the case and ultimately denied relief. *See Siebert,* 778 So. 2d at 846 (discussing Lee County Circuit Court ruling, which "adopted the State's proposed memorandum opinion as its final judgment, denying Siebert the relief requested in his petitions"); *id.* at 856 ("affirm[ing]" denial of relief). Second, the circuit court not only held Siebert's applications untimely, but also held his claims to lack merit and to be barred under several different procedural rules. *Id.* at 846 (discussing 87-page circuit court ruling). The court of criminal appeals, although faulting the circuit court for disposing of the merits, itself pronounced that "we have evaluated the evidence presented at the evidentiary hearing on Siebert's Rule 32 petitions, and we conclude that Siebert received a fair trial and that the trial court correctly denied the petition." *Id.* Neither the circuit court's explicit merits determinations nor the court of

criminal appeals' own evidence-related aside are consistent with a determination that jurisdiction was lacking. Third, both the circuit court and the court of appeals discussed a number of non-jurisdictional bases for allowing the state to raise the time bar despite not having pled this defense in its original response to Siebert's petitions. *Id.* at 848 (discussing Rule 32 statute of limitations and quoting circuit court's opinion allowing state to raise defense in amended answer). All of this discussion would be superfluous if the courts might as easily have relied on the rule's supposedly jurisdictional character.

For these reasons, we believe that although the time bar may now be of jurisdictional import under *Williams*, this was not the case at the time of Siebert's Rule 32 proceedings.

Alabama law made clear instead that noncompliance with the Rule 32 time bar did not divest courts of discretion to entertain late petitions should they choose to do so, at least in the absence of an appropriate pleading by the state of a limitations defense. This was particularly clear with respect to courts' power to rule on the merits of a late-filing petitioner's claims as an alternative ground for denying relief. In *Jackson v. State*, 612 So. 2d 1356, 1357 (Ala. Crim. App. 1992), the court found that a Rule 32 petitioner had filed "over four months beyond the two-year statute of limitations set out in Rule 32.2(c)." The court also noted, however, that "[g]enerally the statute of limitations is an affirmative defense that must be affirmatively pleaded or it is waived," and that the state had not raised the time bar until the conclusion of testimony at an evidentiary hearing.[9] *Id.* Rather than decide whether this constituted a waiver, the court upheld the circuit court's denials of relief on the merits,

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[9] The Court of Criminal Appeals noted that the record showed the district attorney requesting at the conclusion of the evidentiary hearing to "renew" the state's motion to dismiss the petition as time-barred. *Jackson*, 612 So. 2d at 1357. The court added, however, that it found "no indication in the record" that "the district attorney ever made an earlier motion on this basis." *Id.*

attached the circuit court's opinion as an appendix, and itself addressed the one claim neglected by the circuit court, finding it also to be "non-meritorious as a matter of law" and "due to be denied, irrespective of any procedural bar." *Id.*

The Alabama courts' former discretion to entertain late petitions also encompassed the power to grant relief. In *Howard v. State,* 616 So. 2d 398 (Ala. Crim. App. 1993), the Court of Criminal Appeals held that the state, which "merely denied the allegations of the petition" in its "Answer and Motion to Dismiss," had not satisfied its "burden of pleading any ground of preclusion." *Howard,* 616 So. 2d at 399 & n. 1 (quoting Ala. R. Crim. P. 32.3). The appeals court therefore remanded the case for further consideration of the petitioner's claims that he had not been informed of his right to appeal and that his prosecution subjected him to double jeopardy. By reversing the lower court and remanding, the court demonstrated its power to grant typical appellate remedies even when proceedings were originally commenced via an untimely petition.

In decisions prior to and contemporaneous with Siebert's proceedings, the legal analyses set forth by the Court of Criminal Appeals likewise implied the courts' power to vacate convictions or reduce sentences on the basis of claims raised in untimely petitions. In *Howard,* by remanding for further proceedings, the appeals court contemplated the possibility that the circuit court would vacate the petitioner's conviction or permit him to take an out-of-time appeal. In *Callahan v. State,* 767 So. 2d 380 (Ala. Crim. App. 1999), the court recounted a procedural history in which a death-sentenced prisoner filed a Rule 32 petition some ten and a half months after the expiration of the normal two-year limitations period. *Id.* at 383. Nonetheless, the court addressed the substance of each of the petitioner's dozens of claims as to how certain asserted failures of his trial and appellate counsel constituted constitutionally ineffective assistance. Rather than hold these claims subject to Rule 32's time bar, the court held repeatedly that the petitioner had

failed to carry "his burden of proving by a preponderance of the evidence the facts necessary to show that he is entitled to relief." *E.g., id.* at 394, 395, 396, 397, 401. The court used the same language in rejecting the petitioner's claim that the prosecution had failed to disclose exculpatory evidence. *Id.* at 402. With respect to a range of additional substantive claims, the court applied procedural bars unrelated to the statute of limitations. *Id.* at 404. Similarly, in *Jones v. State,* 753 So. 2d 1174 (Ala. Crim. App. 1999), the petitioner filed a Rule 32 petition roughly two months after the end of the normal two-year limitations period. Nonetheless, as in *Callahan,* the court treated the merits of a range of claims concerning ineffective assistance of counsel. As it summarized the endeavor, "we have reviewed each and every allegation of ineffective assistance of counsel and have found either that the allegation is without merit or that Jones failed to prove it." *Id.* at 1199. On other claims, the *Jones* court applied procedural bars other than the statute of limitations. *Id.* at 1205-1206.

Although the court granted relief in neither *Callahan* nor *Jones,* its extensive and manifold analysis of the petitioners' ineffective assistance claims makes clear that relief would have been proper if compelled by the substantive law addressing the Sixth Amendment right to counsel. The state contends that *Jones* and *Callahan* do not show that Alabama courts were authorized to dispense with the statute of limitations, but merely demonstrate that the court failed to notice the limitations period's expiration in these particular cases. The possibility that the court neglected in these cases to confirm the petitions' timeliness, however, actually demonstrates the very point we find most relevant in our "properly filed" inquiry: untimeliness did not mandate a petition's dismissal, but rather was a matter within the court's discretion to ignore. We note that the lengthy opinions published by the Court of Criminal Appeals in *Jones* and *Callahan* set forth comprehensive legal analyses. This approach does not suggest a decisional process in which

the court simply seized upon a ground other than the statute of limitations as the most efficient means to dispose of the claims before it. We instead discern in these cases a resolve on the appeals court's part to address the procedural and substantive aspects of the petitioners' cases in full. The comprehensive analyses set forth reflect, if not necessarily a deliberate decision to permit untimely filing, at least an awareness that untimeliness, were it shown, would not compel the court to refrain from a sustained treatment of the merits. It thus can no more be said that the court failed to notice the running of the statute than that it chose to disregard it.

In this case, the issue of timeliness first arose some three years after Siebert filed his petitions. The circuit court rejected Siebert's argument that the state had waived the statute of limitations defense by failing to plead it sooner. Under the "relation back" doctrine, it held, the state should be allowed to raise the time bar since Siebert had been allowed to amend his own petitions. The Alabama Court of Criminal Appeals upheld this ruling, but it did so on the basis of the circuit court's discretionary authority to allow amendments to pleadings, without determining whether the state was entitled as a matter of law to the benefit of a statute-of-limitations defense. Although the court rejected Siebert's argument that the state waived the defense by not raising it in its "first responsive pleading," the court treated waiver as a question of Siebert's right to timely notice rather than of any state entitlement. *Siebert,* 778 So. 2d at 847-48 (concluding that "Siebert had timely notice of the State's intention to rely on the statute of limitations defense" in addressing waiver issue) (quoting circuit court opinion). While Siebert thus could not demand that he be exempted from the time bar's application, the appeals court's analysis makes clear that enforcement of the limitations period was committed to the circuit court's discretion. This is apparent from its citation of rules providing that "[a]mendments to pleadings *may* be permitted at any stage of the proceedings

prior to the entry of judgment," and that a court "*may* summarily dismiss" a petition when, "assuming the allegations of the petition to be true, it is obviously without merit or is precluded." *Id.* at 848 (citing Ala. R. Crim. P. 32.7(d) and quoting *Burton v. State*, 728 So. 2d 1142, 1147-48 (Ala. Crim. App. 1997)) (additional citations omitted) (emphasis added).[10] The court concluded this portion of its discussion by explaining that "the trial court could have dismissed the petition on procedural grounds even without any response from the State." *Id.*

Because of the role of judicial discretion in the limitations period's application in this case, we need not presently decide what effect untimeliness would have on the "properly filed" inquiry were the state to have pled the limitations period in a manner clearly recognized by Alabama's courts to secure its entitlement to rely on this defense. Here, the time bar's application was not a matter of state entitlement but of court discretion, and the same discretion relied upon to impose the time bar could also have afforded a basis to reach the merits of Siebert's claims, as *Howard, Jackson, Callahan*, and *Jones* make clear. It cannot be said that Alabama law required the courts to refrain from adjudicating the merits of the claims raised in Siebert's untimely petitions. We turn then to the question of what bearing a time bar within a court's discretion to impose has

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[10] In *Siebert*, the court also cited a rule providing that "[l]eave to amend shall be freely granted." Ala. R. Crim. P. 32.7(d). The appeals court appears to have been referring, however, to the leave granted Siebert to amend his own petitions shortly before the evidentiary hearing convened some three years after his original filing. The next sentence of its decision reads: "The granting or denial of a motion to amend a Rule 32 *petition* is within the sound discretion of the trial court, whose ruling on such a motion will be reversed only for an abuse of discretion." *Siebert*, 778 So. 2d at 848 (emphasis added) (citation omitted). We thus cannot read the appeals court's enunciation of a "freely granted" standard to suggest any qualification of the main thrust of its reasoning, which, as described in the text, recognized the circuit court's discretion to allow the state to raise the time bar.

on the question of proper filing under *Artuz*.

III. Discretionary Time Bars as "Conditions to Obtaining Relief"

We are unable to locate any authority addressing the intersection between AEDPA's tolling provision and statutes of limitation *permitting* courts, in their discretion, to examine the merits of claims raised in late petitions. Cases applying the tolling provision in other circuits have predominantly addressed state rules *requiring* courts to determine whether an exception to a limitations period applies. Two of three circuits to have addressed this issue have held that failure to meet a filing deadline will not prevent a petition from tolling AEDPA's limitations period if the state time bar provides exceptions that cannot be applied without at least a limited merits assessment. *Dictado v. Ducharme,* 244 F.3d 724, 727-28 (9th Cir. 2001) (reversing earlier decision, after stay of mandate, in light of Supreme Court's intervening *Artuz* decision); *Smith,* 209 F.3d at 385; *see also Habtesalassie,* 209 F.3d at 1211 n.3 (reserving similar question). These courts have reasoned that since the existence of such exceptions assures at least some level of judicial review of claims raised in late petitions, timeliness is better regarded as a condition to obtaining relief than a condition to filing. *See Dictado,* 244 F.3d at 727-28; *Smith,* 209 F.3d at 385.

The Seventh Circuit has criticized this approach in holding that Illinois' statute of limitations, by permitting late filings on the part of petitioners able to satisfy what the Seventh Circuit characterized as a "miscarriage of justice" standard, does not render all untimely petitions "properly filed." *Brooks v. Walls,* 279 F.3d 518, 521 (7th Cir. 2002), *aff'd on reh'g,* 301 F.3d 839, *cert. denied,* 538 U.S. 1001, 123 S. Ct. 1899, 155 L.Ed.2d 829 (2003). Although the court acknowledged that such a rule requires "at least a sidelong glance at the merits," it characterized the exception as an escape valve for "plain error." *Id.* at 521, 523. The court then reasoned that a state court decision finding (1) that a

petition is untimely, and (2) that no miscarriage of justice requires its entertainment, is of a form traditionally recognized to rest on "adequate and independent state grounds" sufficient to preclude collateral federal review. *Id.* at 523-24. The Seventh Circuit accordingly held that a petition dismissed as untimely by the Illinois courts had not tolled AEDPA's one-year limitations period.

In this case, we believe the discretion left to Alabama courts to enforce the time bar compels the conclusion that timeliness was not a prerequisite to filing *per se*. Since the courts' discretion meant a petition might be entertained even when filed late, the two-year deadline did not create a "timely *filing requirement*." *Artuz*, 531 U.S. at 9 n. 2, 121 S. Ct. 361 (emphasis added). Rather, the very exercise of discretionary authority, regardless of whether or not to excuse lateness, is itself a sufficient quantum of judicial review to show that Alabama courts deemed the form and manner of a petition's filing sufficient to trigger their own authority to act upon claims raised therein. At least in those instances where the courts treated the state as having failed to secure any entitlement to rely on the statute of limitations as a defense, timeliness was not among the conditions required for such discretion. Accordingly, compliance with Rule 32.2(c)'s two-year deadline should be regarded as a condition to obtaining relief rather than a condition to filing, and we cannot say that the deadline was among the "laws and rules governing filings" of Rule 32 petitions. *Id.* at 8, 121 S. Ct. 361.

Our approach is consistent with the Fifth Circuit's in *Smith*. As with the Louisiana law considered in that case, timeliness under Ala. R. Crim. P. 32.2(c) was not a "prerequisite[ ]" that had to be satisfied before Alabama courts would "allow a petition to be filed and accorded *some level* of judicial review." *Smith*, 209 F.3d at 384 (quoting *Villegas v. Johnson*, 184 F.3d 467, 470 n. 2 (5th Cir. 1999) (emphasis supplied in *Smith*)). The Fifth Circuit's refinement of its approach comes nearest to our present task in *Emerson*

v. Johnson, 243 F.3d 931 (5th Cir. 2001), a case decided after *Artuz* and *Smith*. There, the court considered a Texas statute that forbade state habeas petitioners from filing motions for reconsideration, but which Texas courts, by entertaining such motions, had ignored on several occasions. *Id.* at 934-35. Citing "the *Artuz* Court's broad reading of the phrase 'properly filed,'" the Fifth Circuit held that a petitioner's motion for reconsideration, although forbidden by statute, was nonetheless properly filed. *Id.* at 935. The Texas law considered in *Emerson* bore two important resemblances to Alabama's formerly discretionary time bar. First, the courts' occasional neglect of the statute was not pursuant to any equitable exception they might have created to mitigate a rule of doubtlessly harsh consequence. Rather, the rule's non-application was simply an unexplained practice evidenced by three cases in which the Texas courts had entertained motions for reconsideration.[11] As read by the Fifth Circuit, the opinions published in these cases offered no reason for disregarding the statutory bar. Second, the procedural histories of these Texas cases, as recounted by the Fifth Circuit, did not end in vacations of conviction or dismissals of sentences. For the purpose of the "properly filed" inquiry with which the Fifth Circuit was concerned, it was sufficient that the Texas courts, by entertaining motions for reconsideration, had "provided state habeas petitioners with the hope that a motion or suggestion for reconsideration may be successful." *Id.* at 935.

The same must be said of Alabama courts' one-time discretion to entertain untimely petitions. The entertainment of late petitions in *Howard, Jackson, Jones*, and *Callahan* provided prisoners with "some level of judicial review." *Smith*, 209 F.3d at 384. Although the practice reflected in these cases was hardly a guarantee, it did provide Alabama prisoners with the hope that a petition, even if filed late,

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[11] The Fifth Circuit also noted that it could find no case in which the Texas courts had held the statutory bar to prohibit the filing of a motion for reconsideration. *Emerson*, 243 F.3d at 935.

could be successful. Such petitions must in our view be regarded as "properly filed."

Our treatment of Alabama's formerly discretionary time bar is also consistent with the Seventh Circuit's application of AEDPA's tolling provision in *Brooks*. In an opinion affirming the *Brooks* decision on rehearing, the Seventh Circuit panel revisited a hypothetical set forth in its first decision, whereby state law might provide that "any meritorious filing" would be deemed timely. *Brooks v. Walls*, 301 F.3d 839, 841 (7th Cir. 2002). The court explained that "the only sensible understanding" of such a rule "would be that every collateral attack was timely for purposes of state law, *because every one was enough to precipitate a decision on the merits.*" *Id.* (emphasis added). In Alabama at the time of Siebert's Rule 32 proceedings, an untimely petition was "enough to precipitate a decision on the merits," at least in the category of cases, like this one, in which the courts treated the two-year time bar as a condition within their own discretion to apply. *Howard, Jackson, Jones*, and *Callahan* provide examples of merits determinations precipitated by untimely petitions.

We need go no further in addressing the doctrine of adequate and independent state grounds discussed in *Brooks*. As the Seventh Circuit explained, this doctrine has been applied in cases assessing whether a federal habeas petitioner's procedural default of state remedies precludes collateral federal review absent a showing of "cause" and "prejudice." *Brooks*, 279 F.3d at 523 (citing *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977)). Unlike the highly intricate rules governing procedural default, which articulate a judicially crafted doctrine aiming broadly to reconcile the rights of criminal defendants and the role of federal courts with the authority of states and state courts, the application of AEDPA's tolling provision is a comparatively straightforward enterprise predicated on the plain meaning of the phrase "properly filed." In *Artuz*, the Court rejected arguments pertaining to the federalism-related

"object of § 2244(d)(2)" in favor of resolving the case on the basis of "the only permissible interpretation of the text-which may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted." *Artuz*, 531 U.S. at 10, 121 S. Ct. 361.

In light of this instruction that controlling force be given to the literal meaning of the phrase "properly filed," we find it dispositive that the exercise of discretion to enforce or not enforce a post-conviction time bar itself constitutes a sufficient quantum of judicial review to effectively ratify the form and manner of a petition's filing. When a petition has thus empowered a court to act directly upon the claims it raises, we believe it must be regarded as "properly filed." Accordingly, we hold that Siebert's non-compliance with Rule 32's time bar, since it was treated by the Alabama courts as immaterial to their own authority to act upon his claims, did not render his post-conviction applications "[im]properly filed."

Since timeliness is the only issue raised by the state in arguing that Siebert failed to comply with the laws and rules governing filings under Rule 32, we conclude that his petitions were "properly filed" within the meaning of § 2244(d)(2). An application for post-conviction relief, once properly filed, remains "pending" for the purpose of tolling the one-year federal limitations period until the final disposition of any appeals to higher state courts. *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 2138, 153 L.Ed.2d 260 (2002); *Moore v. Crosby*, 321 F.3d 1377, 1380 (11th Cir. 2003) ("It is clear that tolling continues under section 2244(d)(2) while the petitioner appeals the denial of a state application in state court."). AEDPA's limitations period was therefore tolled in Siebert's case from the date of the statute's enactment, at which time his Rule 32 petitions were already pending, until September 15, 2000, when the Alabama Supreme Court denied discretionary review of the Alabama Court of Criminal Appeals' decision upholding the

denial of relief. Because Siebert filed his federal habeas petitions on September 14, 2001, his petitions were filed within one year of the limitations period's commencement. They were thus timely under § 2244(d)(1), and the district courts are due to be reversed.

CONCLUSION

For the foregoing reasons, we VACATE the district court orders dismissing Siebert's petitions and REMAND for further proceedings consistent with this opinion.

VACATED AND REMANDED.

FILED
2006 Feb-09 AM 09:43
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DANIEL SIEBERT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 1:01-cv-2323-IPJ-TMP
	)	
	)	
DONAL CAMPBELL, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Talledega County Circuit Court on March 19, 1987, for capital murder, for which he was sentenced to death. The petitioner, Daniel Siebert,[1] with the assistance of an attorney, filed the instant petition for writ of *habeas corpus* on September 14, 2001. He is incarcerated

[1] In all trial court proceedings, the petitioner's first name was spelled "Danial," but the appellate courts and petitioner's counsel, in the petition for writ of *habeas corpus* filed here, spell the name "Daniel."

on Death Row at Holman Correctional Facility in Atmore, Alabama. The sole issue addressed in this opinion is whether, in light of the complex procedural history of the case and changes in controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit, petitioner's state Rule 32 petition was "properly filed" for purposes of tolling the one-year limitation for filing federal *habeas* actions found at 28 U.S.C. § 2244(d).

I. PROCEDURAL HISTORY IN FEDERAL COURT

On September 14, 2001, the petitioner, represented by counsel, filed the instant *habeas corpus* petition. Petitioner filed an amended petition on October 26, 2001. On February 5, 2002, the respondents filed an answer and a motion to dismiss supported by a memorandum of law, contending that the petition is time-barred by operation of 28 U.S.C. § 2244(d)(1).[2] On March 20, 2002, respondents filed a supplemental memorandum of law, and petitioner filed a response to the motion to dismiss on May 6, 2002. The court entered a memorandum opinion and order on September 30, 2002, granting the respondents' motion to dismiss and dismissing the petition as time-barred. Petitioner appealed to the Eleventh Circuit Court of Appeals. The appellate court issued its mandate on December 4, 2003,[3] vacating and remanding, holding that the *habeas* petition was not time-barred because it was "properly filed" within the meaning of that term as explained by the Supreme Court in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213

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[2] Respondents also raise issues of procedural default. Because the petition clearly is time-barred, the court need not address any other issue.

[3] The opinion, published as *Siebert v. Campbell*, 334 F.3d 1018,1032 (11th Cir. 2003), vacated and remanded both the instant case and another *habeas* action Siebert filed in the District Court of the Middle District of Alabama, challenging his death sentence for three other murders. It will be referred to hereinafter as "Siebert I."

(2000). *See Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003).

Following the announcement of the Supreme Court's decision in *Pace v. DiGuglielmo*, __ U.S. __, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), on April 27, 2005, the respondents filed a renewed motion to dismiss on May 11, 2005, contending that *Pace* severely undermined the rationale in *Siebert*, requiring this court to dismiss on time-bar grounds, notwithstanding the mandate from the Court of Appeals. Petitioner filed a response on June 13, 2005, and respondents filed a reply on July 11, 2005. By order dated August 31, 2005, the court noted that the Eleventh Circuit Court of Appeals had mentioned the instant case in its unpublished opinion in *Colbert v. Head*, 146 Fed. Appx. 340, 344-345 and n.4 (11th Cir. 2005), and the order directed the parties to file any additional authority or argument related to the application of *Pace* to the instant motion in light of *Colbert*. On September 12, 2005, petitioner and respondents filed memoranda in response to the order.

II. PROCEDURAL HISTORY IN STATE COURT

On March 19, 1987, the petitioner was convicted after a jury trial for the capital murder of Linda Ann Jarman[4] during the course of a robbery.[5] The jury recommended that petitioner be sentenced to death, and on April 17, 1987, the trial judge sentenced petitioner to death by electrocution. Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, which affirmed on April 14,1989. *Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989). On March 30, 1990, the Alabama Supreme Court affirmed the decision of the appellate court. *Siebert v. State*, 562 So. 2d 600 (Ala. 1990). A certificate of judgment was issued by the Alabama

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[4] The victim's name is spelled "Jarmin" in some state court documents.

[5] In a separate trial held in Lee County, after a motion for change of venue was granted in the Talladega County Circuit Court, Siebert subsequently was convicted of capital murder in connection with the strangulation deaths of Sherri Weathers and her two young sons.

Court of Criminal Appeals on May 22, 1990. The court did not send a copy to the petitioner, but did send a copy to the Talladega County Circuit Court. On November 5, 1990, the United States Supreme Court denied petitioner's application for writ of *certiorari*. *Siebert v. Alabama*, 498 U.S. 963, 111 S. Ct. 398, 112 L. Ed. 2d 408 (1990).

On or about August 25, 1992,[6] petitioner filed a petition for post-conviction relief in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.[7] The state filed an answer on October 15, 1992, and did not raise the defense that the petition was time-barred. The trial court conducted evidentiary hearings on petitioner's claims of ineffective assistance of counsel on April 3-5, 1995, and on September 26, 1995. On April 4, 1995, the state amended its answer and raised for the first time the defense that the petition was untimely filed. On December 30, 1998, the court ruled that the Rule 32 petition was untimely filed pursuant to Alabama Rule of Criminal Procedure 32.2(c). The court also addressed the petition on the merits and denied all claims. Petitioner appealed to the Alabama Court of Criminal Appeals, which affirmed the denial on December 30, 1999. *Siebert v. State*, 778 So. 2d 842 (1999). The Alabama Supreme Court denied *certiorari* on September 15, 2000. *Siebert v. State*, 778 So. 2d 857 (Ala. 2000). Petitioner did not seek review in the United States Supreme Court.

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[6] The parties refer to the filing date as August 24, 1995. The document attached as defendants' Exhibit 36 shows a date stamp of August 25, 1995. The precise date is not material, however, to the ultimate resolution of this matter.

[7] The Rule 32 petition arising from his conviction for the murder of Jarman was ultimately consolidated in Talledega County Circuit Court with the Rule 32 petition challenging his conviction in Lee County for the murders of Weathers and her two children.

III. TIMELINESS

A. Law-of-the-Case Doctrine

The first question the court must address is whether the issue of timeliness of the filing of the instant *habeas* petition may be revisited in light of *Pace*, or whether the law-of-the-case doctrine requires the court to deem the petition timely filed and address it on the merits. While it is well settled under the law-of-the-case doctrine that the determination of "an issue decided at one stage of a case is binding at later stages of the same case," *Schiavo v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005), there are established exceptions to that general rule. The doctrine, designed to promote the efficiency of the judicial process and to provide certainty and finality to matters litigated, also must provide for just and correct adjudications of fact and law. *See, e.g., Klay v. All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004), citing *Burger King Corp. v. Pilgram's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994). Thus, an exception exists when "controlling authority has been rendered that is contrary to the previous decision." *Schiavo*, 403 F.3d at 1292. As discussed below, *Pace* constitutes controlling authority that is contrary to the previous decision of the Eleventh Circuit Court of Appeals in *Siebert*. Accordingly, the law-of-the-case doctrine does not prevent a reexamination of the issue in light of the new authority.

B. Application of *Pace*

The respondents assert that the proclamation made by the Supreme Court in *Pace* constitutes a change in law on a controlling issue; accordingly, the court must examine whether the intervening decision affects the mandate to treat Siebert's petition as timely filed. Petitioner argues that *Pace* is inapplicable and that his claims must be reviewed on the merits.

There is no dispute among the parties, or in the mandate issued by the Eleventh Circuit Court of Appeals, that the

instant petition is untimely under a strict reading of Section 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which establishes a one-year deadline for the filing of *habeas* actions under § 2254 challenging the validity of state criminal convictions. Unless the Rule 32 petition filed in state court counts to toll the running of the one-year limitation, almost eleven years of untolled time elapsed between the date the Supreme Court denied *certiorari* on direct appeal in 1990 and the date petitioner filed the instant *habeas* petition in 2001. What petitioner argues, and what the Eleventh Circuit Court of Appeals held when remanding this matter, is that the limitation period is subject to tolling under § 2244(d)(2), which states:

> (2) The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. [Italics added].

Subsection 2244(d)(2) provides for the tolling of the limitation period during those times the petitioner has pending a "properly filed" post-conviction petition in state court. If, as the appellate court determined in its 2003 mandate, petitioner's Rule 32 petition was "properly filed," the *habeas* petition is timely because the time from the enactment of the AEDPA until September 15, 2000, was tolled by the pendency of the Rule 32 petition, and petitioner filed the instant petition within one year after that date. On the other hand, if the untimeliness of the Rule 32 petition prevents it from being characterized as "properly filed" under the definition set forth in *Pace*, there was no tolling of the federal habeas limitation, and the petitioner's claims are time-barred.

In the nine years since the enactment of the AEDPA, the issue of whether a post-conviction petition is "properly filed" has been examined in different contexts, as was discussed in this court's earlier memorandum opinion dismissing the

petition. As of the date the mandate was issued in this case, the controlling law was set forth in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000), in which the Court affirmed the Second Circuit Court of Appeals and determined that a state post-conviction petition that contained claims that were procedurally barred was nonetheless "properly filed." It is important to note that *Artuz* did not involve the assertion that the state collateral petition was procedurally defaulted because it was not timely filed; the alleged procedural defaults were of a different nature. Nevertheless, in rejecting the argument, the Supreme Court noted that conditions for proper filing include "the form of document, *the time limits upon its delivery*, the court and office in which it must be lodged, and the requisite filing fee." *Id.* at 8, 121 S. Ct. at 364 [Italics added].

On April 27, 2005, the Supreme Court had the opportunity to expound on *Artuz* in the specific context of time limits for filing. In *Pace v. DiGuglielmo*, ___ U.S. ___, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), the Court held that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered "properly filed" within the meaning of the AEDPA's tolling provision. The court stated simply: "[W]e hold that time limits, *no matter their form*, are 'filing' conditions." *Id.* at ___, 125 S. Ct. at 1814 [italics added]; *see also Anderson v. Attorney General of Florida*, 135 Fed. Appx. 244, 246 (11th Cir.2005), *cert. denied*, 126 S. Ct. 835 (2005).

In *Pace*, the Court decided whether the untimely filing of a post-conviction petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA") could serve to toll the AEDPA one-year limitation. The governing Pennsylvania statute provided that post-conviction petitions must be filed within one year from the date the conviction becomes final, but further provided three exceptions to the timebar when: (1) governmental interference prevents filing; (2) new constitutional rules are made retroactive; or (3) new facts arise that could not have been discovered through due

diligence. *Pace*, 125 S. Ct. at 1810 n.1. After the petitioner in *Pace* filed a post-conviction petition that was dismissed as without merit, petitioner appealed. The respondents raised the issue of timeliness, which the petitioner disputed, but the state appellate court held that the post-conviction petition was untimely filed. *Id.* at 1810-11. Pace then sought relief from his convictions in a federal *habeas* action. A magistrate judge recommended that the petition be dismissed as time-barred, but the district court held that the petitioner was entitled to both statutory and equitable tolling. *Id.* at 1811. As described by the Supreme Court, the district court "reasoned that because the PCRA set up judicially reviewable exceptions to the time limit, the PCRA time limit was not a 'condition to filing' but a 'condition to obtaining relief' as we described those distinct concepts in *Artuz v. Bennett*, 531 U.S. 4, 11, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000)." *Pace*, 125 S. Ct. at 1811. On appeal, the Court of Appeals for the Third Circuit reversed, reasoning that the time limitation provided by the Pennsylvania statute constituted a "condition to filing," and that an untimely petition could not be "properly filed." *Pace*, 125 S Ct. at 1811.

When *Pace* reached the Supreme Court, the Court reviewed the question that was raised but not decided in *Artuz*: "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Pace*, 125 S. Ct. at 1811. The Court determined that, regardless of whether the state's statutory scheme provided exceptions to the post-conviction petition deadline, there exist "no grounds for treating the two differently." *Id.* The court went on to explain:

> As in *Artuz*, we are guided by the "common usage" and "commo[n] underst[anding]" of the phrase "properly filed." *Id.* at 8, 9, 121 S. Ct. 361. In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to

> that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception. The purpose of AEDPA's statute of limitations confirms this commonsense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

Id. at 1811-12. The Court further explained that, when the state courts hold that a post-conviction petition is untimely under state law, "'that is the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 1812.

The Court's discussion in *Pace* of its earlier decision in *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), is illuminating. The Court wrote:

> *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002), points to the same conclusion. In *Saffold*, we considered whether § 2244(d)(2) required tolling during the 4 1/2 months between the California appellate court's denial of Saffold's postconviction petition and his further petition in the California Supreme Court. The California Supreme Court denied the petition "on the merits and for lack of diligence," which raised the question whether that court had dismissed for lack of merit, for untimeliness, or for both. *Id.*, at 225, 122 S. Ct. 2134 (internal quotation marks omitted). Although we ultimately remanded, we explained that, "[i]f the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was 'unreasonable,'" *i.e.*, untimely, "*that would be the end of the matter*, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.*, at 226, 122 S. Ct.

> 2134 (emphasis added); *see also id.*, at 236, 122 S. Ct. 2134 (KENNEDY, J., dissenting) ("If the California court held that all of [Saffold's] state habeas petitions were years overdue, then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period"). What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, "that [is] the end of the matter" for purposes of § 2244(d)(2).

Pace v. DiGuglielmo, ___ U.S. ___, ___, 125 S. Ct. 1807, 1812, 161 L. Ed. 2d 669 (2005). This reference to *Saffold* makes clear that, regardless of whether the state courts alternatively address the merits of an untimely filed petition, the time limit itself is a "condition to filing," which, if not met, prevents the state petition from being timely filed for purposes of tolling the federal *habeas* limitation at § 2244(d). The definition of "properly filed" under *Pace* does not include a time-barred state post-conviction petition, even if it ultimately is reviewed on the merits in the state court, so long as the state court has deemed it untimely. *Pace*, 125 S. Ct. at 1815-16 (J. Stevens, dissenting).

In this case, petitioner filed his Rule 32 post-conviction motion in the state trial court on August 25, 1992. Upon motion of the respondents, the trial court dismissed the petition as untimely filed pursuant to Rule 32.2(c), noting that the certificate of judgment following petitioner's direct appeal was issued by the Alabama Court of Criminal Appeals on May 22, 1990, making any Rule 32 petition filed later than May 21, 1992, untimely.[8] The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court

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[8] Alabama Rule of Criminal Procedure 32.2(c) in effect at the time governing petitioner's motion prescribed a limitation period requiring any Rule 32 petition to be filed "within two years after the issuance of the certificate of judgment by the Court of Criminal Appeals." Since then, the time limit has been shortened to one year, consistent with § 2244(d).

denied *certiorari* on September 15, 2000. Thus, the state courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed. Although the trial court examined petitioner's Rule 32 claims on the merits in addition to finding the claims time-barred, the Alabama Court of Criminal Appeals expressly held that the trial court should not have addressed the barred claims on the merits, as such an examination is not permitted by the Alabama rule.[9] The petition contained no allegations of newly discovered evidence that might trigger the six-month exception to the two-year rule. Likewise, in his appeal from the denial of his Rule 32 petition, petitioner did not assert that, because his claims were premised upon newly discovered evidence, he was entitled to an extension of time in accordance with Alabama Rule of Criminal Procedure 32.2(c).

In his response to the current motion to dismiss, Siebert contends that *Pace* is inapposite because the Pennsylvania statute at issue was not "insufficiently established or inconsistently applied." (Petitioner's Response at p. 5). This argument confuses the issue of timeliness under the statutory tolling provision and whether the state court's adjudication of timeliness is due deference in the context of a procedural default. *See, e.g., Dugger v. Adams*, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). The issue in this case is simply one of statutory interpretation: whether the untimely Rule 32 petition meets the "properly filed" requirement of § 2244(d)(2). It is true that the Eleventh Circuit's opinion in *Siebert* stated for the first time that state procedural rules must be "firmly established and regularly followed" to be honored for purposes of interpreting the "properly filed"

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[9] Rule 32.2(c) specifically states that the court "shall not entertain any petition for relief" that is untimely, as opposed to simply precluding the court from granting the relief, which further makes clear that the statute of limitation is a "condition of filing" as discussed in *Artuz* and *Pace*.

standard for tolling, but this holding, at least in the context of time limits for filing, is undermined by *Pace* for the reasons now being addressed. In fact, in a pre-*Pace* case, the Court of Appeals appears to have clarified the *Siebert* holding that, to be "firmly established and regularly followed," the time limit for filing must be jurisdictional. As Judge Carnes wrote in *Hurth v. Mitchem*, which examined the Eleventh Circuit Court of Appeals' reasoning in *Siebert I*:

> The purpose and function of the "properly filed" requirement of § 2244(d)(2) is different from that of the procedural bar doctrine. *Artuz v. Bennett*, 531 U.S. 4, 9, 121 S. Ct. 361, 364, 148 L. Ed. 2d 213 (2000) ("[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar."); *see also Estes v. Chapman*, 382 F.3d 1237, 1239 (11th Cir. 2004) (discussing *Artuz*); *Wade v. Battle*, 379 F.3d 1254, 1259-60 (11th Cir. 2004) (quoting *Artuz*).

Hurth, 400 F.3d 857, 862 (11th Cir. 2005).[10] The Court further noted that "[n]owhere in *Siebert* did we hold, state, or imply that Rule 32.2(c) was not firmly established and regularly followed (as a non-jurisdictional rule) [for purposes of procedural default] by the Alabama courts before *Williams*." *Id.* Such findings, the Court explained, relate to federal *habeas* procedural bar purposes, but not to the issue presented by *Siebert*, which is the different animal of statutory tolling. *Id.* at 861-863.

The court believes that *Pace* effectively overruled *Siebert*, mandating, instead, that state time limits for filing post-conviction petitions are "conditions to filing," and not merely "conditions to obtaining relief," and that, regardless

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[10] *Hurth* was announced on February 16, 2005, before *Pace* was announced on April 27, 2005. Thus, the *Hurth* Court did not have the benefit of the Supreme Court's reasoning in *Pace*.

of whether the state court also addresses the merits of an untimely filed state petition, once the state court determines that the state petition was untimely filed, that "ends the matter" as far as considering the petition "properly filed" for tolling under § 2244(d). The essential rationale of *Siebert* – that, because the Alabama state courts occasionally addressed the merits of time-barred petitions before 2000, the time limitation of Rule 32.2(c) was a "condition to obtaining relief," rather than a "condition to filing," – simply cannot be squared with *Pace* and its reference to *Saffold*. The Supreme Court cannot state more clearly than it did in *Pace* that "time limits, *no matter their form*, are 'filing' conditions." *Pace*, 125 S. Ct. at 1814. Siebert's focus on whether the time limitation in Rule 32.2(c) was "jurisdictional" is meaningful only in determining whether the time limitation was a "condition to filing" or a "condition to obtaining relief." The *Siebert* court concluded that, because the time limitation was not "jurisdictional" before 2000, it only limited the state court's ability to grant relief, not its ability to accept an untimely petition for filing. Nothing in *Pace* or § 2244(d), however, says that only "jurisdictional" rules constitute "conditions to filing." Indeed, many of the "conditions to filing" identified by the Supreme Court in *Artuz* – the form of the pleading and the payment of a filing fee – are not jurisdictional in the sense that the court lacks the power to deal with the matter. More to the point, the Supreme Court itself, in *Pace*, identified Alabama's time bar as one of the very types of rules that constitute "conditions to filing." The Court explained:

> The dissent suggests that our conclusion in *Artuz*, that state procedural bars "prescrib[ing] a rule of decision for a court" confronted with certain claims previously adjudicated or not properly presented are not "filing" conditions, requires the conclusion that the time limit at issue here also is not a "filing" condition. *Post*, at 1819; *see Artuz v. Bennett*, 531 U.S., at 10-11, 121 S. Ct. 361 (discussing N.Y. Crim. Proc. Law §§

> 440.10(2)(a) and (c) (McKinney 1994)). The dissent ignores the fact that *Artuz* itself distinguished between time limits and procedural bars. 531 U.S., at 8-10, 121 S. Ct. 361. For purposes of determining what are "filing" conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of "rule of decision" procedural bars at issue in *Artuz*, which go to the ability to obtain relief. [FN7].

Id. at ___, 125 S. Ct. at 1814. At footnote seven, the Court then gives examples of the types of state procedural rules that constitute "conditions to filing," explicitly identifying Alabama's Rule 32.2(c) time limit as one. Footnote seven in *Pace* reads:

> FN7. *Compare, e.g.*, Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth v. Fahy*, 558 Pa. 313, 328, 737 A.2d 214, 222 (1999) (describing the time limit as "jurisdictional"); *2 Ala. Rule Crim. Proc. 32.2(c) (2004-2005) (stating that a court "shall not entertain" a time-barred petition),* with 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004-2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz*, are present). [Italics added for emphasis].

Id. at ___, 125 S. Ct. at 1814 n.7. Plainly, the Supreme Court considered Alabama's Rule 32.2(c) to be the type of rule that is a "condition to filing," violation of which would preclude

the petition from being "properly filed" for 2244(d)(2) purposes.

Because *Pace* is controlling contrary authority, the mandate issued in *Siebert* does not preclude the court from again considering the timeliness of the instant *habeas* petition. Because the Alabama state courts clearly and explicitly found Siebert's 1992 Rule 32 petition to be untimely filed, this court has no option but to conclude that it was not "properly filed" for purposes of tolling the § 2244(d) time limitation. Accordingly, *Pace* compels the conclusion that Siebert's petition must be dismissed as untimely.

C. Effect of *Colbert*

Finally, the court also believes that the Eleventh Circuit's unpublished opinion in *Colbert v. Head*, 146 Fed. Appx. 340 (11th Cir. 2005), does not require a different result. *Colbert* is the only case involving this question decided by the Eleventh Circuit Court of Appeals after the Supreme Court announced *Pace*. But, for the reasons explained below, *Colbert* cannot be read as a binding statement of authority, at least with respect to application of *Pace* to Alabama's Rule 32.2(c) time limitation.

After *Pace*, it appeared clear that the untimely state petition filed by Siebert could not be used to toll the § 2244(d) limitation. Even so, in *Colbert v. Head*, the Court of Appeals quoted its earlier opinion in *Siebert* for the proposition that the state's "consistent application" of its own procedural rules must be present before the rules are due deference. *Colbert*, 146 Fed. Appx. at 344. The court wrote in *Colbert* the following about *Siebert*:

> In interpreting *Artuz*, we have concluded that we must give "due deference" to state procedural rules governing whether a § 2244(d)(2) application is "properly filed," with the caveat that the state rule be "firmly established and regularly followed." *Wade*, 379 F.3d at 1259-60. In *Siebert v. Campbell*, 334

> F.3d 1018, 1025 (11th Cir. 2003), we examined whether § 2244(d)(2)'s tolling provisions were applicable when a state habeas court had found that the petitioner's application for habeas relief was precluded by a state statute of limitations. *Id.* at 1021. We discussed that:
>
> > The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice.
>
> *Id.* at 1025. Thus, after determining that the state rule at issue was not "firmly established and regularly followed" at the time of the petitioner's state habeas filing, we concluded in *Siebert* that the rule should not be given deference. *Id.* at 1025-29.

Id. at 344. At first blush, this reference to *Siebert I* might indicate that the Eleventh Circuit Court of Appeals does not interpret *Pace* as having any application here. Upon closer examination, however, this court is convinced that the reference to *Siebert I* does not constitute binding authority regarding the issue of timeliness in the instant matter because *Colbert* is an unpublished opinion with no precedential force and, even within the context of *Colbert*, it is *dicta*.

First, *Colbert* is an unpublished opinion and thus provides no binding precedent. *See* Eleventh Circuit Court of Appeals Rule 36-2, which states in part, "Unpublished opinions are not considered binding precedent." Second, the reference to *Siebert* in *Colbert* is *dicta*. *Colbert* dealt with the question whether, under Georgia law, the filing of a motion to withdraw a guilty plea after the end of the term of court in which the guilty plea was entered was "properly filed" for purposes of tolling § 2244(d). The Court of Appeals concluded that, because the state court had no

jurisdiction to act on such a motion, the motion was not "properly filed." This says nothing about the effect of the time limitations for filing Rule 32 petitions under Alabama law. A determination that Alabama's Rule 32.2(c) limitation was not jurisdictional until 2000 was not necessary to a resolution of the Georgia procedural question. Thus, even though *Siebert* is mentioned in passing, it was not necessary to the resolution of the question presented in *Colbert*.

Accordingly, this court must be guided by the clear holding in *Pace*. Because the United States Supreme Court has clearly stated that a state court's determination that a petition for post conviction relief is untimely constitutes the "end of the matter," petitioner's argument that he is entitled to statutory tolling is unavailing. *Pace* constitutes an intervening controlling authority regarding the very issue presented here – the meaning of "properly filed" in § 2244(d)(2). Under *Pace*, the untimely state petition filed by Siebert was not a "properly filed application" capable of tolling the limitation. Petitioner's *habeas* petition therefore is time-barred pursuant to § 2244(d)(l), and the motion to dismiss is due to be granted.

CONCLUSION

The court has not undertaken the task at hand lightly or with disrespect toward the mandate of the Court of Appeals. The court is well aware of its obligation to follow the law, including the law of the case when it applies. The court is mindful of the high stakes involved for the petitioner, who is facing a sentence of death and whose post-conviction claims have gone unheard so far. Nevertheless, the court is sworn to uphold the law – all of the law – even when doing so may seem unfair and harsh. The only tools the court may work with are those given it by Congress, the Supreme Court, and the Court of Appeals, and the court is obligated to harmonize those tools in arriving at an outcome dictated by the law. Using those tools, the court believes that *Pace* requires a second look at *Siebert*.

Accordingly, for the reasons stated above, the court finds that the petition for writ of *habeas corpus* under 28 U.S.C. § 2254 is due to be dismissed with prejudice as time-barred by 28 U.S.C. § 2244(d). Petitioner, with the assistance of counsel, waited until September 2001 to file the instant *habeas* petition, more than five years after the limitation period was enacted in 1996. The Rule 32 petition pending at the time the AEDPA became law did not act to toll the running of the limitation period under § 2244(d)(2), because it was found to be itself untimely filed under Alabama state law and procedure. Being untimely itself, the Rule 32 petition was not a "properly filed application" within the meaning of § 2244(d)(2), such that it could toll the running of the federal limitation period. *See Pace*, 125 S. Ct. at 1811-12.

By separate order, the court will GRANT the respondents' motion to dismiss the instant petition with prejudice.

DATED the 9th day of February, 2006.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
APRIL 30, 2007
THOMAS K. KAHN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06- 11841-P

DANIEL SIEBERT,

Petitioner-Appellant,

versus

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion March 7, 2007, 11th Cir., 2007, ___F.3d___).

Before: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CUCURIAM [sic]:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENITRED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

Opposition Brief Unavailable for Filming at this Time

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(4)

No. 06-1680

In the
Supreme Court of the United States

Richard ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

v.

Daniel SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

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September 28, 2007

QUESTION PRESENTED

(Capital Case)

In *Pace v. DiGuglielmo*, this Court held that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In a 1-page precedential opinion, the Eleventh Circuit ruled below, without any analysis, that the holding in *Pace* simply does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit – even where, as here, the time bar is both invoked and enforced. The question presented is whether the Eleventh Circuit's decision should be reversed because it impermissibly ignores the plain language of this Court's opinion in *Pace* and frustrates AEDPA's statutory purposes.

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ARGUMENT

If there is any truth to the adage that the best way to get a meritorious cert petition denied is to confuse the issues and muddy the waters, Siebert's brief in opposition is a tour de force. It is a study in misdirection. The problem for Siebert, however, is that the issue presented here – which he does not even remotely join – is simple and straightforward. Exceedingly so, in fact. In *Pace v. DiGuglielmo*, this Court held, in the clearest terms imaginable, that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In the decision below, the Eleventh Circuit held, in equally clear terms, that the rule of *Pace* simply does not apply where the underlying state post-conviction "statute of limitations ... operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit. App. 1a. The question here is whether the exception that the Eleventh Circuit has decreed – *i.e.*, for non-jurisdictional, defensive time-bars – is consistent with *Pace*. It is not.

This Court should grant the petition and summarily reverse or, alternatively, grant the petition and set the case for briefing and argument. Siebert has given this Court no reason not to do so.

I. Siebert Offers Virtually No Response To The Arguments Contained In The Petition.

Tellingly, Siebert has almost nothing to say about the arguments actually presented in the petition. ***First***, he offers no response to the State's contention that the categorical language of *Pace* controls the question presented here. As the State emphasized in the petition (Pet. 13-14, 19), *Pace* (1) reiterates that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed'"; (2) holds that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)"; and (3) concludes that where "the state court reject[s a] petitioner's [post-conviction] petition as untimely, it [is] not 'properly filed,' and he is not entitled to statutory tolling under

§ 2244(d)(2)." 544 U.S. at 413, 414, 417. Siebert provides absolutely no explanation how *Pace* can reasonably be read (as the Eleventh Circuit has read it) to carve out an exception for defensive time bars. And with good reason: There is none. This Court's opinion in *Pace* is clear as a bell; the Eleventh Circuit either fundamentally misunderstood it or purposefully subverted it.[1]

Second, Siebert offers no response to the State's observation (Pet. 19-20) that in *Pace*'s predecessor, *Artuz v. Bennett*, this Court listed as "proper[] fil[ing]" requirements, in addition to (1) "time limits upon [a petition's] delivery," (2) the "form of the document," (3) the "court and office in which it must be lodged," and (4) the "requisite filing fee." 531 U.S. 4, 8 (2000). Because, the State pointed out, "*[n]one* of those requirements is 'jurisdictional in the sense that the court lacks power to deal with the matter,'" Pet. 20 (quoting App. 61a), it simply cannot be, as the Eleventh Circuit held here, that only jurisdictional rules can be "proper[] fil[ing]" requirements and, therefore, that because Rule 32.2(c)'s time

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[1] Siebert's only response to *Pace* itself is to this Court's specific citation of Alabama's Rule 32.2(c) as a "proper[] fil[ing]" requirement. *See* Pet. 15-17. Siebert attempts to zing the State of Alabama for having "represented" in its amicus brief in *Pace* that Rule 32.2(c) was a jurisdictional requirement. Br. in Opp. 19. The zinger misses the mark, however, and, in fact, serves to underscore the point we are making here about *Pace*'s general applicability. At the time Alabama filed its brief in *Pace* in January 2005, the intermediate court of criminal appeals had held that Rule 32.2(c)'s time bar *was* jurisdictional. *See Williams v. State*, 783 So. 2d 135, 137 (Ala. Crim. App. 2000). As pointed out in the petition, however (Pet. 7 n.7), the Alabama Supreme Court recently clarified, to the contrary, that Rule 32.2(c) is defensive in nature. *See Ex parte Ward*, __ So. 2d __, 2007 WL 1576054, at *7 (Ala. June 1, 2007). In any event, the point – to which Siebert has not responded – is that given Pennsylvania's and Alabama's emphasis on the (then) jurisdictional characters of the limitations provisions at issue in *Pace*, this Court "had every opportunity to limit the scope of its holding to technically jurisdictional state time bars." Pet. 19 n.14. Instead, this Court "generalized its holding, in the interest of establishing an unambiguous rule, to include all state-court determinations of untimeliness." Pet. 19.

bar "operated as an affirmative defense" (App. 1a) it cannot be a filing condition. Pet. 20. Again, no rebuttal from Siebert.

Third, Siebert offers no response to the State's contention that "the Eleventh Circuit's holding undermines the purposes that animate AEDPA's limitations and tolling provisions." Pet. 20. As the State pointed out in the petition, under the Eleventh Circuit's rule, any inmate in any jurisdiction with a defensive time bar may, in direct contravention of *Pace*, *see* 544 U.S. at 413, "unilaterally extend the time for filing his federal habeas petition simply by lodging an untimely state petition." Pet. 21. Once again, Siebert has nothing to say in reply.

Fourth, Siebert offers no response to the State's argument that "the Eleventh Circuit's holding defies common sense." Pet. 21-22. He never provides any explanation of why, in the real world, "a state time bar's formal character as either a jurisdictional barrier or an affirmative defense should matter one whit to the statutory 'proper[] fil[ing]' criterion." Pet. 22. The reason is that there simply is no good reason to treat jurisdictional and defensive statutes differently – particularly where, as here, the time bar is both invoked and enforced.[2]

Finally, Siebert offers no response to the State's contention that "the Eleventh Circuit's decision implicates a question of national importance." Pet. 23-30. Nor could he. As is amply demonstrated by the amicus curiae brief filed by Illinois and 18 other States in support of Alabama's petition,

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[2] Siebert's only argument in this connection is to say that "where a state applies its statute of limitations as an affirmative defense, a petition, even though filed beyond the limit, would be timely for tolling purposes *if the state never raises the defense*." Br. in Opp. 20 (emphasis added). The simple, and dispositive, answer is that in *this* case (1) the State invoked the time bar and (2) the state courts (a) explicitly rejected any suggestion that the State had waived the bar and (b) enforced the bar by dismissing Siebert's Rule 32 petition as untimely. *See* Pet. 22 & n.15.

this is a case whose significance radiates well beyond the parties to this litigation. The reason, as we have explained – and as Siebert has made no effort to deny – is that the logic of the Eleventh Circuit's decision "leaves a whole host of States right back where they started before this Court decided *Pace*." Pet. 23.[3]

II. Siebert's Efforts To Deflect Attention From The Question Presented – And Ultimately To Confuse The Court – Are Both Unpersuasive And Deceitful.

Rather than join issue on the question that this case presents – whether there is any basis for reading *Pace* to exclude non-jurisdictional, defensive time bars – Siebert makes two "moves" (both of which the State anticipated, *see* Pet. 6 n.6, 17-18 n.12) in an attempt to suggest that, in fact, the case may not present that question at all. Neither move is availing and, as we will explain, both rest on what can only be understood as a conscious effort to mislead the Court.

A. The "Firmly Established And Regularly Followed" Rule Is Not At Issue Here.

The principal theme of Siebert's brief in opposition, such as it is, is that the Eleventh Circuit did not refuse to apply *Pace* because Rule 32.2(c)'s statute of limitations is defensive rather than jurisdictional but, instead, refused to apply

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[3] Siebert's suggestion (Br. in Opp. 21-22) that the Alabama Supreme Court's recent decision in *Ex parte Ward*, __ So. 2d __, 2007 WL 1576054, somehow diminishes the practical significance of this case is baseless. Clearly, the question whether *Pace* governs the tolling question where the underlying state time bar "operate[s] as an affirmative defense" (App. 1a) controls Siebert's own case. By confirming that Alabama's Rule 32.2(c) "is an affirmative defense and not a jurisdictional bar," *Ward*, __ So. 2d __, __, 2007 WL 1576054, at *7, *Ward* makes clear that the same question will be dispositive in Alabama on a going-forward basis. And, as already noted, the Eleventh Circuit's decision here is practically important enough to trigger an amicus brief by 19 additional States, 18 of which lie outside the Eleventh Circuit's jurisdictional boundaries.

Pace because Rule 32.2(c)'s statute of limitations was not "firmly established and regularly followed" (or "FERF") at the time Siebert filed his post-conviction petition. Siebert's argument in that respect – which begins with his restatement of the question presented (Br. in Opp. i) and continues throughout the entirety of his brief (*e.g.*, Br. in Opp. 1, 8-18, 21) – is quite wrong. Worse than wrong, Siebert's argument – and we do not say so lightly – can only be understood as a deliberate attempt to mislead the Court.

1. That Siebert's argument is wrong – and his effort to recharacterize the decision under review, unpersuasive – is clear from the face of the Eleventh Circuit's own opinion. The Eleventh Circuit here refused to "revisit[its] opinion in *Siebert I* in light of *Pace*" for one reason and one reason only: because it believed that "*Pace* did not address the question presented in *Siebert I, to wit: a statute of limitations that operated as an affirmative defense*." App. 1a (emphasis added). The Eleventh Circuit conspicuously did *not* say that "*Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that was not 'firmly established and regularly followed' at the time the state post-conviction petition was filed." So, again, as we have said (and as Siebert has made no effort to dispute), "the court of appeals made nothing of the consistent-application issue" and, in fact, "it is clear from its opinion that the Eleventh Circuit would refuse to apply *Pace* to any statute of limitations that 'operate[s] as an affirmative defense,' no matter how uniformly applied." Pet. 18 n.12.[4]

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[4]Accordingly, Siebert's labored effort (*e.g.*, Br. in Opp. 8-12) to recharacterize as a pure FERF case the *Siebert I* decision filed by Judges Barkett, Wilson, and Tjoflat – a decision that, we admit, is no portrait of precision – runs headlong into *Siebert II*, in which *the very same Judges Barkett, Wilson, and Tjoflat* make clear that the "question presented in *Siebert I*" was "a statute of limitations that operated as an affirmative defense." App. 1a.

2. There is, as it turns out, a very good reason that the *Siebert II* panel did not distinguish *Pace* (and rule for Siebert) on the ground that Alabama's Rule 32.2(c) was not FERF at the time Siebert filed his post-conviction petition. The reason, as we explained in the petition (Pet. 17-18 n.12), is that only nine months before it issued the decision under review, the same Eleventh Circuit panel – Judges Barkett, Wilson, and Tjoflat – held, in a parallel case involving Siebert himself, that Rule 32.2(c) ***was*** FERF at the time Siebert filed. *See Siebert v. Allen*, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (following *Hurth v. Mitchem*, 400 F.3d 857, 863 (11th Cir. 2005), which "explicitly held that Alabama's Rule 32 was sufficiently firmly established and regularly followed to warrant a procedural default"), *cert. denied*, 127 S. Ct. 1823 (2007).

Given the overriding emphasis that Siebert places on the FERF rule in his brief in opposition, his failure to breathe there even a word of the Eleventh Circuit's decision in his parallel case – which, so as to avoid confusion with *Siebert I* and *II*, we'll call *Siebert A*[5] – is deceptive in the extreme. We don't say so lightly, but there is simply no other explanation. Siebert's current counsel certainly can't plead ignorance of *Siebert A* – they litigated it. Two of Siebert's current attorneys briefed that case in the Eleventh Circuit, and one of them presented the oral argument there. The whole point of Siebert's argument in *Siebert A*, of course, was that "the state law ground applied in Mr. Siebert's case" – *i.e.*, the Rule 32.2(c) time bar – "was not firmly established and regularly followed." Br. of Appellant, *Siebert v. Campbell* at 9-

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[5] Recall that Siebert filed two separate habeas petitions in two different federal district courts challenging two distinct convictions. *Siebert I* dealt with both petitions together. On remand from *Siebert I*, the two cases were decoupled. *Siebert II*, the decision under review here, arises out of the conviction for the murder of Linda Jarman. What we are calling *Siebert A* arises out of the convictions for the murders of Sherri Weathers and her two young sons. *See* Pet. 3, 5 & n.5.

14, No. 05-16646-P (Jan. 9, 2006). But as we have explained, the Eleventh Circuit decided that question – squarely – against Siebert, holding that Rule 32.2(c) "was sufficiently firmly established and regularly followed to warrant a procedural default." *Siebert A*, 455 F.3d at 1271. Then, having lost on the FERF issue in the Eleventh Circuit, Siebert's lawyers – the same two – filed a cert petition in this Court challenging the Eleventh Circuit's decision. In that petition, they contended – as they do in their opposition here and, indeed, citing the very same state court cases – that Rule 32.2(c) was not FERF and that the Eleventh Circuit had erred in concluding otherwise. *See, e.g.*, Pet. for Writ of Certiorari at 4, *Siebert v. Allen*, No. 06-8808 (Jan. 2, 2007) ("Alabama's courts, at the time that Mr. Siebert's state postconviction petition was filed, did not apply it consistently to petitioners in his position."); *id.* at 6 ("The rule Alabama applied to Mr. Siebert, that the State may raise an untimeliness defense at any time, was novel and was not firmly established at the time of his sate postconviction filing."). This Court denied the petition. *See Siebert v. Allen*, 127 S. Ct. 1823 (2007).

The point is simply that the Eleventh Circuit's decision in the current case, *Siebert II*, did *not* turn on a determination that Rule 32.2(c) was not FERF – and Siebert's lawyers know perfectly well it didn't. Not only does the face of the *Siebert II* opinion itself make clear that it turns, instead, on a determination that *Pace* doesn't apply to time bars that "operate[] as an affirmative defense" (App. 1a), but also, nine months before they decided *Siebert II*, the same three Eleventh Circuit judges had definitively decided in *Siebert A* that Rule 32.2(c) *was* FERF at the time Siebert filed his state post-conviction petition.

Siebert's lawyers are intimately familiar with the history of these cases. Their suggestion that *Siebert II* is about anything other than *Pace*'s application to defensive (as opposed to jurisdictional) time bars – and their failure to come clean concerning *Siebert A* – can only be understood as a conscious

effort to mislead the Court. That effort should not be rewarded.[6]

B. Siebert's Equitable-Tolling Argument Is Both Waived And Meritless.

In a second effort to cloud the sole issue presented, Siebert asserts in his opposition that even if *Pace* controls the statutory-tolling question here, he is nonetheless entitled to equitable tolling. There are two problems: waiver and baselessness.

1. For starters, Siebert says that he "has not waived the issue of equitable tolling." Br. in Opp. 20-21. He is wrong, as a brief history will conclusively demonstrate. As Siebert explains, "[t]he State raised the issue of equitable tolling in its [original, September 2001] Motion to Dismiss" in *Siebert I*. Br. in Opp. 7 n.7. Although Siebert did "not specifically argue that his petition should not be viewed as time-barred based on the doctrine of equitable tolling" (App. 14a), the district court gave him the benefit of the doubt and considered the equitable-tolling issue on the merits (App. 14a-16a). Having reviewed the circumstances of Siebert's case, the district court held that "the statute of limitation [wa]s not due to be equitably tolled." App. 16a. Siebert did not contest – nor does he even claim here to have contested – that adverse determination on appeal to the Eleventh Circuit in *Siebert I*; the phrase "equitable tolling" appears nowhere in Siebert's briefs to that court. The equitable-tolling issue was thus irrevocably waived at that point. *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (holding that arguments not raised in appellant's opening brief are waived).

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[6] Even if *Siebert II* could be recharacterized as a FERF case – which, in view of its own plain language and the intervening decision in *Siebert A*, it can't be – the Eleventh Circuit's importation of the FERF rule into the § 2244(d)(2) "proper[] fil[ing]" analysis would be irreconcilable with *Carey v. Saffold*, 536 U.S. 214 (2002). *See* CJLF Br. 7-8.

When on remand in what became *Siebert II* the State again moved to dismiss on *Pace* grounds, Siebert defended against *Pace* but did not seek (nor does he now even claim to have sought) equitable tolling. In fact, the *only* place that Siebert now claims to have mentioned equitable tolling throughout the entire 6+ year history of this habeas litigation is in a single sentence of the "prayer for relief" (*i.e.*, the concluding paragraph) in his opening brief to the Eleventh Circuit in *Siebert II*. That sentence, in full, reads as follows: "Because this is a death penalty case, should this Court rule adversely to Mr. Siebert, it should still remand to the District Court for consideration of the appropriateness of equitable tolling." Br. of Appellant at 21, *Siebert v. Allen*, No. 06-11841-P (May 2, 2006). That passing reference was too little, too late. It was too late, of course, because the equitable-tolling issue had already been irrevocably waived by virtue of Siebert's failure – which he acknowledges here – to present the issue to the Eleventh Circuit in *Siebert I*. It was too little because under the controlling law "a passing reference in an appellate brief is insufficient to raise an issue." *Chavis v. Clayton County Sch. Dist.*, 300 F.3d 1288, 1291 n.4 (11th Cir. 2002); *accord Draper v. Reynolds*, 369 F.3d 1270, 1277 n.12 (11th Cir. 2004) (holding that where a "brief on appeal fails to argue the merits" of a claim, that claim is "waived"). Accordingly, there can be no meaningful dispute here that the equitable-tolling argument is indeed waived.

2. The equitable-tolling argument is meritless, in any event. Siebert bases his claim to equitable tolling on his assertion that he "never received a copy or notice of the certificate of judgment issued by the Alabama Court of Criminal Appeals," issuance of which started the clock on his Rule 32 petition. Br. in Opp. 7-8; *see id.* at 21 ("Mr. Siebert never himself received notice of the issuance of a certificate of judgment."). The problem is, that issue, like the FERF issue, has already been finally decided against Siebert – indeed, in the same *Siebert A* litigation that Siebert's lawyers have so studiously avoided mentioning. There, the Eleventh Circuit addressed the identical contention that Siebert "did not per-

sonally receive notice of the time that his state postconviction limitations period began to run" – asserted there as "cause" for a procedural default – and flatly rejected it: "Siebert, who was represented by counsel, does not present any evidence that his counsel did not receive the certificate of judgment or that the clerk of court failed to comply with the Alabama Rules of Appellate Procedure," which requires service of all court orders on attorneys of represented parties. 455 F.3d at 1272-73. This Court, as noted, denied certiorari. 127 S. Ct. 1823.

Siebert's failure to apprise this Court of *Siebert A* is, therefore, doubly dishonest. Not only does that case completely unravel Siebert's effort to recharacterize the decision below as turning on the FERF rule (*see supra* at 4-7), it also pulls the string on Siebert's attempt to revive the equitable-tolling issue.

CONCLUSION

This Court should grant the petition and summarily reverse or, alternatively, grant the petition and set the case for briefing and argument.

Respectfully submitted,

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No. 06-1680

IN THE

Supreme Court of the United States

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

vs.

DANIEL SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), this Court addressed the question "whether a state postconviction petition rejected by the state court as untimely nonetheless is 'properly filed' within the meaning of [28 U. S. C.] § 2244(d)(2)," so as to toll the AEDPA statute of limitations, and the Court decided it was not. The present case raises the following question:

Is *Pace* inapplicable to a state's time limitation merely because that limitation has an exception requiring a judicial determination before a petition is rejected as untimely?

IN THE

Supreme Court of the United States

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

vs.

DANIEL SIEBERT,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to partici-

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and McGeorge School of Law student Kayvan Hazemi, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief.

pate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Eleventh Circuit's decision in this case is tantamount to a judicial repeal of AEDPA's statute of limitations in any state where time limitations have any exceptions or flexibility built into them. In such states, prisoners would be able to grant themselves unlimited extensions merely by filing obviously untimely state collateral petitions. Such a frustration of the purpose of the statute of limitations is contrary to the interests CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 2007

Respectfully submitted,

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IN THE

Supreme Court of the United States

RICHARD ALLEN, Commissioner,
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Petitioner,

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Siebert was tried and found guilty of capital murder in two separate prosecutions. In Talladega County on April 17, 1987, he was sentenced to death for the capital murder of Linda Jarman. *Siebert* v. *State*, 562 So. 2d 586 (Ala. Crim. App. 1989). In Lee County on August 19, 1987, he was sentenced to death for the murder of her neighbors, Sherri, Joseph, and Chad Weathers. *Siebert* v. *State*, 555 So. 2d 772 (Ala. Crim. App. 1989). The Supreme Court of Alabama denied certiorari in both cases and issued certificates of final judgment on May 22, 1990, and January 3, 1990. *Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990); *Ex parte Siebert*, 555 So. 2d 780 (Ala. 1989). This Court denied certiorari on November 5, 1990, and June 28, 1990, respectively.

Siebert v. *Alabama*, 498 U. S. 963 (1990); *Siebert* v. *Alabama*, 497 U. S. 1032 (1990).

Siebert filed two state petitions for postconviction relief pursuant to Rule 32 of Alabama Rules of Criminal Procedure in Talladega County on August 25, 1992, and in Lee County on June 30, 1992. *Siebert* v. *State*, 778 So. 2d 842, 846 (Ala. Crim. App. 1999). Rule 32 states that "[t]he court shall not entertain any petition for relief . . . unless the petition is filed . . . within two (2) years after the issuance of the certificate of judgment . . . ." Ala. Rule Crim. Proc. 32.2(c). The two petitions, filed after the two-year limitations period, were consolidated and rejected as "untimely." The timeliness portion of the circuit court decision is reproduced in the Appendix to this brief. The Court of Criminal Appeals affirmed, 778 So. 2d, at 849. The Supreme Court denied certiorari. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000). The Alabama Supreme Court included a reminder that denial of certiorari does not imply endorsement of the lower court's opinion in its entirety. See *id.*, at 857. A concurring opinion explains that there is no doubt about the holding at issue here, though.

> "[T]he result reached by the Court of Criminal Appeals in this case is entirely justifiable on the ground that the defendant's Rule 32, Ala. R. Crim. P. petition was filed after the two-year deadline without any proof of an excuse that might warrant an extension of the deadline pursuant to Rule 1.3(b), Ala. R. Crim. P." *Ibid.* (Johnstone, J., concurring specially).

Siebert filed two federal habeas petitions on September 14, 2001, 364 days after the Supreme Court of Alabama denied certiorari for his state petition. He challenged his sentence for the murder of Ms. Jarman, the Talladega County case, in the Northern District. He challenged his sentence for the Weathers family

murders, the Lee County case, in the Middle District. Both courts granted the respondent's motion to dismiss on statute of limitations grounds. *Siebert* v. *Haley*, 193 F. Supp. 2d 1260, 1272 (MD Ala. 2002); *Siebert* v. *Haley*, No. 01-J-2323-E (ND Ala. 2002), App. to Pet. for Cert. 2a, 23a. The Eleventh Circuit decided the appeals from these two decisions in a single opinion. See *Siebert* v. *Campbell*, 334 F. 3d 1018 (2003).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year period of limitation on federal habeas petitions. 28 U. S. C. § 2244(d)(1). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U. S. C. § 2244(d)(2). As in other pre-AEDPA cases, Siebert had until April 23, 1997, to file a timely federal habeas petition unless tolling extended that time. See *Carey* v. *Saffold*, 536 U. S. 214, 217 (2002). Thus, the AEDPA bars Siebert's federal petition unless his Rule 32 petition was "properly filed" within the meaning of § 2244(d)(2) and tolled the one-year period of limitations between April 23, 1997, and September 15, 2000.

Citing Alabama's determination that Siebert's Rule 32 petition did not meet the state filing deadline, both district courts refused to toll the AEDPA limitations period. *Siebert* v. *Haley*, 193 F. Supp. 2d, at 1272; *Siebert* v. *Haley*, App. to Pet. for Cert. 23a. Reversing both decisions, the Eleventh Circuit Court of Appeals held that Alabama's timely filing requirement did not preclude the state petition from being " 'properly filed' within the meaning of § 2244(d)." *Siebert* v. *Campbell*, 334 F. 3d, at 1032, App. to Pet. for Cert. 47a.

On remand in the case of the Weathers family murders, the Middle District denied relief on the

ground of procedural default. *Siebert* v. *Campbell*, 2005 U. S. Dist. LEXIS 36136, 2005 WL 2456032 (MD Ala., Oct. 4, 2005). The Eleventh Circuit affirmed, *Siebert* v. *Campbell*, 455 F. 3d 1269 (2006), and this Court denied certiorari on March 19, 2007. *Siebert* v. *Allen*, No. 06-8808, 127 S. Ct. 1823, 167 L. Ed. 2d 331 (2007). This judgment is not at issue in the present petition.

While the present case, regarding the murder of Ms. Jarman, was pending on remand in the Northern District, this Court decided in *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), that "time limits, no matter their form, are 'filing' conditions." Following *Pace*, the District Court again dismissed the petition as falling outside the AEDPA's tolling provision. *Siebert* v. *Campbell*, No. 1:01-CV-2323-IPJ-TMP (ND Ala., Feb. 9, 2005), App. to Pet. for Cert. 66a. Siebert appealed again, and the Court of Appeals reversed and remanded the case with instructions for the lower court to rule on the merits. *Siebert* v. *Allen*, 480 F. 3d 1089 (CA11 2007) (*Siebert II*), App. to Pet. for Cert. 1a. The State timely filed the present petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision in this case is clearly contrary to this Court's precedents in *Carey* v. *Saffold* and *Pace* v. *DiGuglielmo*. The time limitation in *Saffold* was not jurisdictional and involved the exercise of judicial judgment. Even so, this Court held that so long as the state court determined that the petition was untimely it would not toll the federal statute. *Pace* further rejected the notion that a quantum of judicial review removed a state time limit from the category of filing conditions.

This case meets the criteria for summary reversal. No new law needs to be made to decide it. The Court of Appeals' decision is obviously erroneous under *Saffold* and *Pace*.

ARGUMENT

I. The Eleventh Circuit's limitation of *Pace* is clearly contrary to both *Pace* itself and *Carey* v. *Saffold*.

A. Saffold.

If a state court clearly ruled that a state collateral review petition was untimely, "that would be the end of the matter," this Court held in *Carey* v. *Saffold*, 536 U. S. 214, 226 (2002). In its two opinions in the present case, *Siebert* v. *Campbell*, 334 F. 3d 1018 (CA11 2003) (*per curiam*) (*Siebert I*), and *Siebert* v. *Allen*, 480 F. 3d 1089 (CA11 2007) (*Siebert II*), the Eleventh Circuit held that does *not* end the matter. Instead, the federal court must inquire further into such questions as whether the time limitation is jurisdictional, whether its status was clearly established, whether it operates as an affirmative defense, and whether it involves the exercise of discretion. See 334 F. 3d , at 1025, 1027; 480 F. 3d, at 1090. In so holding, the decision was contrary to *Saffold*, where the time limitation was plainly not jurisdictional. Indeed, the time limit at issue in *Saffold* was not a statutory limit at all, but rather a creation of case law. See *In re Clark*, 5 Cal. 4th 750, 782-783, 855 P. 2d 729, 750-751 (1993).

The Eleventh Circuit correctly stated that "the application of AEDPA's tolling provision is a comparatively straightforward enterprise predicated on the plain meaning of the phrase 'properly filed.' " *Siebert I*, 334 F. 3d, at 1032. However, the Court failed to notice

that "compliance with the applicable rules and laws governing filings" is "quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz* v. *Bennett*, 531 U. S. 4, 8-9 (2000) (emphasis omitted). Only by ignoring the plain meaning of the phrase could the Court go on to hold that Siebert's failure to comply with Alabama's timely filing requirement "did not render his post-conviction applications improperly filed." 334 F. 3d, at 1032. The Eleventh Circuit justified its holding on the premise that "a sufficient quantum of judicial review . . . effectively ratif[ies] the form and manner of filing." *Ibid.* This holding is contrary to this Court's opinion in *Carey* v. *Saffold*.

In *Saffold*, this Court rejected the Ninth Circuit's suggestion that the California Supreme Court's consideration of the merits meant that it "could not have considered [Saffold's] petition too late." 536 U. S., at 225. California employs a "flexible, discretionary timeliness standard" on habeas appeals, which necessarily involves the exercise of judicial discretion. See *Evans* v. *Chavis*, 546 U. S. 189, 203 (2006) (Stevens, J., concurring). On an appeal from the denial of statutory tolling, the Ninth Circuit reversed, insisting that treatment of the merits "in the course of determining whether an untimeliness bar should apply" involved the same tolling concerns as a direct review of the merits. *Saffold* v. *Newland*, 250 F. 3d 1262, 1267 (CA9 2001). Like the Eleventh Circuit in the present case, the Ninth Circuit missed the point. "[I]t is the State's interests that the tolling provision seeks to protect . . . ." *Saffold*, 536 U. S., at 223. Where the principles of comity, finality, and federalism are concerned, there is no "critical difference" between a mandatory time limit and the "indeterminate" timeliness rule of California's "general 'reasonableness' standard." *Id.*, at 222. Both are laws that govern when an application is properly

filed. Disregarding the existence of a timely filing requirement merely because it is discretionary, and then using the existence of that discretion to imply that the petition was properly filed, "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Id.*, at 226. Since, where the inquiry is whether the petition is in compliance with "the applicable laws and rules governing filings," *Artuz*, 531 U. S., at 8, it makes little sense to differentiate between a mandatory time bar and a timely filing requirement involving some "quantum of judicial review." If the State ultimately determines that the application was filed late, it is "the end of the matter." *Saffold*, *supra*, at 226.

In the course of expanding AEDPA's tolling for "properly filed" petitions to those barred by nonjurisdictional time limits, *Siebert I* took an astonishing leap. The Eleventh Circuit imported wholesale into the law of AEDPA one of the most confused and tangled aspects of pre-AEDPA habeas law, the requirement that state rules be " 'firmly established and regularly followed' " to qualify as adequate state grounds under the procedural default doctrine. See 334 F. 3d, at 1025. This area of law is, to put it bluntly, a mess. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 5-10, available at http://www.cjlf.org/pdf/Lee.pdf. The goal of Congress in enacting AEDPA was to streamline habeas litigation. The notion that Congress intended to incorporate a doctrine that has produced protracted litigation on collateral issues, see, *e.g.*, *Bennett* v. *Mueller*, 322 F. 3d 573 (CA9 2003), would require exceptionally compelling justification. *Siebert I* provides no justification, and the holding cannot be squared with *Saffold*'s "end of the matter" language. In the procedural default area, a clear state holding that a claim is barred is not the end

of the matter but only the beginning of a new round of litigation. *Saffold* indicated that no new round follows a clear state holding of untimeliness. In *Saffold*, the Ninth Circuit had similarly imported procedural default law into a statute of limitation case, holding that the entanglement of the timeliness ruling with the merits meant the ruling lacked independence of federal law. *Saffold*, 250 F. 3d, at 1267. This Court specifically rejected this holding, stating that the clear state-court holding ended the matter "*regardless* of . . . whether its timeliness ruling was 'entangled' with the merits. 250 F. 3d, at 1267." 536 U. S., at 226 (emphasis added). Even before *Pace*, *Siebert I* was clearly contrary to this Court's precedent.

B. Pace.

Decided between *Siebert I* and *Siebert II*, *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), held that state petitions that fail to meet state time limits are, necessarily, improperly filed, and that the existence of exceptions to such time limit offers "no grounds" for treating the petitions differently. *Id.*, at 413 ("a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exception"). For practical purposes, a petitioner who files a state petition after a fixed time limit is no less entitled to statutory tolling than a petitioner whose late filing is discovered through a more involved inquiry. Since neither petition complied with "the applicable laws and rules governing filings," neither petition should toll the statute of limitations. Because a timely filing requirement necessarily governs when an application's filing is proper, it must be a "condition to filing," no matter its form. *Ibid.* "What we intimated in *Saffold* we now hold: When a postconviction petition is

untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.*, at 414.

Pace clarified once more that the guide to identifying filing conditions was common usage and common understanding. *Id.*, at 413. In *Siebert II*, the Eleventh Circuit again refused to heed this Court, reversing the District Court's post-*Pace* decision without analysis. In *Siebert I*, the court had indicated what it thought was "most relevant in [its] 'properly filed' inquiry: untimeliness did not mandate a petition's dismissal, but rather was a matter within the court's discretion to ignore." 334 F. 3d, at 1028. The court felt that the discretion left to the State court "compels the conclusion that timeliness was not a prerequisite to filing per se." *Id.*, at 1030. Hence, compliance with the "applicable laws and rules governing filing" was unnecessary, so long as a "quantum of judicial review" was involved rejecting the petition. *Ibid.* However, filing fees and jurisdictional matters that are prerequisites to filing "often necessitate judicial scrutiny" as well. *Pace*, *supra*, at 414.

Pace reiterated that "*Artuz* itself distinguished between time limits and procedural bars." 544 U. S., at 417. "[T]here is an obvious distinction" here. *Ibid.* A time limit is necessarily one of "the applicable laws and rules governing filings." *Artuz*, 531 U. S., at 8. On the other hand, procedural bars, like the ones at issue in *Artuz*, say little about how, when, or where an application is to be filed. *Artuz*'s single reference to a "condition to obtaining relief" only says that the state procedural bars at issue in the case had no indications of being classified by the State as filing conditions. To say that "they have been properly delivered and accepted so long as the filing conditions have been met," *id.*, at 11, is only to reiterate the simple fact that "filing conditions" are "the applicable laws and rules governing

filings." *Id.*, at 8. To give a district court the authority to toll the statute of limitations merely because a state court considers, but ultimately rejects, the allegation that an application is in compliance with the applicable laws and rules governing filings would do little to encourage the timely pursuit of relief, while simultaneously undermining the "well-recognized interest in the finality of state court judgments." *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001). Indeed, to do so on the basis of some "quantum of judicial review" would turn practically every discretionary aspect of the rules and laws governing filings into "a *de facto* extension mechanism, quite contrary to the purpose of AEDPA." *Pace*, 544 U. S., at 413.

II. Siebert's state petition was not properly filed and hence the limitation period was not tolled.

In *Siebert I*, the Eleventh Circuit made great efforts to show that Alabama's timeliness requirement was not a "filing condition" because it was discretionary and not jurisdictional in nature. *Siebert* v. *Campbell*, 334 F. 3d 1018, 1026-1027 (CA11 2003) ("Neither the circuit court's explicit merits determinations nor the court of criminal appeals' own evidence-related aside are consistent with a determination that jurisdiction was lacking"). This opinion is far removed from the state court's interpretation of Alabama's timely filing requirements.

The Eleventh Circuit would require that, to show that a timeliness rule is a filing condition, a state court "refrain from adjudicating the merits of the claims raised in . . . untimely petitions." *Siebert I*, 334 F. 3d, at 1029. However, as this Court had earlier recognized in *Carey* v. *Saffold*, 536 U. S. 214, 225-226 (2002), a

court may address the merits of a claim that is otherwise barred for many reasons. "[F]or instance . . . where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief." *Ibid.* It is not for federal courts to impose such requirements on state courts by otherwise tolling the AEDPA period of limitations. *Evans* v. *Chavis*, 546 U. S. 189, 207 (2006) (Stevens, J., concurring) ("if the state court's untimeliness ruling is clear, that would be the end of the matter, even if the court had also ruled on the merits").

Furthermore, the Alabama Circuit Court explicitly stated that treatment of the merits did not mean that the court was exercising its jurisdiction. "Siebert's petitions are due to be dismissed as being untimely filed beyond the applicable statute of limitations and therefore insufficient to invoke the jurisdiction of this Court to hear the petitions on the merits." Appendix 5. The Court addressed the merits of Siebert's petition only in the alternative. In truth, *Siebert I* relies on the existence of a discretionary exception to Rule 32 that never existed. *Ex parte Siebert*, 778 So. 2d 857, 858 (Ala. 2000) (Johnstone, J., concurring) ("Whether this particular rule can authorize an extension of the two-year deadline for filing a Rule 32 petition has not been previously decided by either the Court of Criminal Appeals or this Court"). See also *Siebert* v. *State*, 778 So. 2d 842, 850 (Ala. Crim. App. 1999) ("Moreover, we note that Rule 1.3(b) specifically prohibits extending the time for a motion for new trial, for filing an appeal, or for a motion for a judgment of acquittal pursuant to Rule 20—all postconviction proceedings, like a Rule 32 petition"). *Siebert II*, upholding the earlier decision, establishes a dangerously broad precedent for federal interference with state court judgments, implicitly deciding for itself the timeliness of a petition that had

already been deemed untimely by the state. It is based on a phantom of state discretion, non-existent in truth and unemployed in fact. Siebert's petition was late when he filed it. He did not meet the exception of Rule 1.3(b) of Alabama Rules of Criminal Procedure. 778 So. 2d, at 849. He is not entitled to statutory tolling.

III. Summary reversal is appropriate in this case.

Summary reversal is appropriate where the decision below is legally erroneous and the error is obvious. See *Gonzales* v. *Thomas*, 547 U. S. 183, 185 (2006) (*per curiam*). For the reasons stated above, this is such a case. The Court has previously "exercise[d] [its] summary reversal procedure . . . to correct a clear misapprehension of the [controlling legal] standard." *Brosseau* v. *Haugen*, 543 U. S. 194, 198, n. 3 (2004) (*per curiam*).

Although *Saffold* and *Pace* were decided by narrowly divided courts, they are now established precedents. No new law needs to be made to decide the case. The Eleventh Circuit's decision is a "demonstrably erroneous application" of those precedents, see *Maryland* v. *Dyson*, 527 U. S. 465, 467, n. * (1999) (*per curiam*), and nothing else is required.[2]

---

2. The doctrine of the law of the case, which the Court of Appeals relied on, *Siebert* v. *Allen*, 480 F. 3d 1089, 1090 (CA11 2007), App. to Pet. for Cert. 1a, has no application once the case reaches this Court on certiorari. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 816 (1988).

CONCLUSION

The petition for certiorari should be granted, the decision of the Court of Appeals for the Eleventh Circuit should be reversed, and the case should be remanded with directions to affirm the decision of the District Court.

September, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

DANIEL SIEBERT,	)	
PETITIONER,	)	
V.	)	Case No. CV-92-319
STATE OF ALABAMA,	)	
RESPONDENT.	)	

MEMORANDUM OPINION

Based on the evidence presented at trial and the hearing on the Rule 32 petitions, the Court enters the following findings of fact and conclusion of law:

I. PROCEDURAL HISTORY

Siebert was indicted on two counts of capital murder. One indictment charged Siebert with the murders of Sherri Weathers, Joseph Weathers, and Chad Weathers. The other indictment charged Siebert with the death of Linda Jarman. Siebert was first tried in Talladega County (CC-86-300) under the indictment charging the capital murder of Linda Jarman. On March 19, 1987, Siebert was convicted of the capital murder of Linda Jarman. On March 20, 1987, the jury recommended a sentence of death. On April 17, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

Subsequently, Siebert was granted a change of venue for the indictment charging the capital murders of Sherri, Joseph, and Chad Weathers. Siebert's trial for the Weathers' murders was held in Lee County. (CC-87-371) This Court also presided over that case.

Siebert was convicted for capital murder of the Weathers' family on June 18, 1987. On the same day, the jury recommended that Siebert be sentenced to death. On August 19, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

After Siebert's Talladega and Lee County conviction and death sentence were affirmed on direct appeal, Siebert filed two Rule 32 petitions. The petition concerning the Linda Jarman case was filed on August, 24, 1992, in the Talladega County Circuit Court. The petition concerning the Weathers' case was filed on June 26, 1992, in Lee County Circuit Court. Because this Court presided over both the Talladega and Lee County trial, this Court transferred the Lee County Rule 32 (CC-87-371) petition to Talladega County so that it could be considered simultaneously with the Talladega County Rule 32 petition. (CC-86-300) This Court consolidated both petitions into one action to determine if Siebert is entitled to relief from conviction or sentence of death. (CV-92-319)

II. SIEBERT'S PETITIONS ARE DUE TO BE DISMISSED AS UNTIMELY FILED PURSUANT TO RULE 32.2(C) OF THE ALABAMA RULES OF CRIMINAL PROCEDURE.

Rule 32.2(c) of the Alabama Rules of Criminal Procedure specifically states that "That court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, A.R.App.P." (emphasis added) The petition in

former Talladega County case CC-86-300 was filed on or about August 24, 1992. The Alabama Court of Criminal Appeals in the former Talladega County case CC-86-300 issued the Certificate of Judgment on May 22, 1990. The petition in former Lee County case CC-87-371 was filed on or about June 25, 1992. The Alabama Court of Criminal Appeals in the former Lee County case CC-87-371 issued the Certificate of Judgment on January 30, 1990. Clearly, both petitions were filed outside the two-year statute of limitations.

Siebert asserts three grounds upon which this Court should hold that Siebert's petitions are not barred by the two-year statute of limitations: (1) The State waived the affirmative defense of the statute of limitations when it failed to raise it in its first responsive pleadings; (2) a direct appeal is not final until the United States Supreme Court denies certiorari; and, (3) any failure to timely file the petitions was the result of excusable neglect under Rule 1.3 (b), Ala.R.Crim.P. The Court will address each of these issues as follows:

A. The State Of Alabama Did Not Waive The Statute Of Limitations Defense By Failing To Raise It In Its First Responsive Pleading.

Siebert asserts that the State did not provide him notice of its intention to rely on the statute of limitations defense because the State failed to plead the defense in its initial response. After Siebert untimely filed both of his petitions, the State responded to the Talladega County petition on or about October 14, 1992. The State responded to the Lee County petition on or about July 27, 1992. The State did not assert a statute of limitations defense in either initial response. On or about March 28, 1998, Siebert filed an amendment to both of his Rule 32 petitions. Seven days later, on April

4, 1995, the State filed a response to both amended petitions asserting that the petitions were barred in their entirety by the two-year statute of limitations. The State's response placed Siebert on notice within seven days after Siebert filed his amended petitions. If Siebert can file amendments to his petition and have those amendments relate back to the original petition, the State can file an answer to those amendments and have it relate back to the original answer (the initial responsive pleading). Siebert had timely notice of the State's intention to rely on the statute of limitations defense and the State did not waive the statute of limitations defense.

B. The Statute Of Limitations Began To Run When The Court Of Criminal Appeals Issued The Certificate Of Judgment.

Siebert asserts that his convictions were not final until the United States Supreme Court denied his petition for certiorari on his Talladega County conviction on November 5, 1990, and his petition for certiorari on his Lee County conviction on June 28, 1990. Siebert asserts the statute of limitations did not begin to run until the United States Supreme Court denied certiorari on both of his petitions. Rule 32.2 (c) of the Alabama Rules of Criminal Procedure specifically states that this Court shall not entertain a petition for relief from conviction or sentence unless it is filed within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals. Rule 41(b) of the Alabama Rules of Appellate Procedure specifically states:

> The timely filing of a petition for certiorari in the supreme court shall stay the issuance of the certificate of judgment by the courts of appeals,

> which stay shall continue until the final disposition by the supreme court. Upon the filing of a copy of an order of the supreme court denying the petition for certiorari, the certificate of judgment of the courts of appeals shall issue immediately.

It is clear from Rule 32.2(c) of the Alabama Rules of Criminal Procedure and Rule 41(b) of the Alabama Rules of Appellate Procedure that Siebert's conviction was final on the date the Alabama Court of Criminal Appeals issued the certificate of judgment in both petitions. Therefore, this ground is without merit.

C. Siebert's Untimely Filing Of His Rule 32 Petitions Is Not The Result Of Excusable Neglect.

This Court holds that the untimely filing of Siebert's Rule 32 petitions is not the result of excusable neglect. This Court chooses not to entertain Siebert's Talladega County and Lee County Rule 32 petitions due to the untimely filing of both petitions.

Due to the untimely filing of both petitions, and the reasons stated above, Siebert's petitions are due to be dismissed as being untimely filed beyond the applicable statute of limitations and therefore insufficient to invoke the jurisdiction of this Court to hear the petitions on the merits. In the alternative, this Court finds Siebert's Talladega County and Lee County Rule 32 petitions do not support the relief he seeks because they are without merit.

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SUPREME COURT, U.S.

No. 06-1680

In the Supreme Court of the United States

RICHARD ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, PETITIONER,

v.

DANIEL SIEBERT, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ARKANSAS, ARIZONA, COLORADO, FLORIDA, IOWA, MAINE, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Pace v. DiGuglielmo*, this Court held that "a state post-conviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In a 1-page precedential opinion, the Eleventh Circuit ruled below, without any analysis, that the holding in *Pace* simply does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit—even where, as here, the time bar is both invoked and enforced. The question presented is whether the Eleventh Circuit's judgment should be reversed because it impermissibly ignores the plain language of this Court's opinion in *Pace* and frustrates AEDPA's statutory purposes.

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a state post-conviction petition, filed beyond the time allowed by state law and dismissed as untimely by the state courts, nevertheless should be regarded as "properly filed" and therefore capable of tolling the one-year period for filing a federal habeas corpus petition, so long as the state limitations period is not jurisdictional as a matter of state law.

The *Amici* States have a powerful interest in the resolution of this question. As this Court has repeatedly affirmed, the rights of state court defendants to federal habeas review must be balanced against a State's interest in the finality of its criminal convictions. Reflecting these competing concerns, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), includes a one-year limit on a state defendant's ability to pursue federal habeas relief, but tolls the running of that period during the pendency of a state defendant's "properly filed" application for state post-conviction review. The rule announced by the Eleventh Circuit in this case would deny the many States whose limitations periods are not clearly jurisdictional the right to finality by allowing the "state prisoner [to] toll the statute of limitations at will simply by filing untimely state post-conviction petitions," *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005), precisely what this Court sought to avoid with its decision in *Pace*.

STATEMENT

1. In 1987, a jury convicted Daniel Siebert of capital murder committed in the course of a robbery. Pet. App. 3a. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction, and a certificate of judgment issued on May 22, 1990. *Id.*

2. On August 25, 1992, Siebert filed a petition for state post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Pet. App. 3a. In an amended answer, the State argued that Siebert's Rule 32 petition was untimely because it was filed beyond the two-year limitations period then in place under Rule 32.2(c). Pet. App. 4a. The Alabama trial court denied relief on this ground and on the merits, *id.*, but the Alabama Court of Criminal Appeals affirmed solely because Siebert's petition was untimely. *Id.* at 13a. The Alabama Supreme Court denied Siebert's certiorari petition on September 15, 2000. *Id.* at 4a.

3. Siebert filed his federal habeas corpus petition on September 14, 2001. The State moved to dismiss the petition as untimely under 28 U.S.C. § 2244(d)(1), which gives a state defendant one year to seek habeas relief after his state conviction becomes final. Pet. App. 4a.[1] Siebert did not dispute that he failed to file his petition within the one-year limit. *Id.* at 6a n.7. Instead, he claimed that the one-year limitations period was tolled while his untimely Rule 32 petition was pending in the Alabama courts. Siebert founded this claim on 28 U.S.C. § 2244(d)(2), which exempts from the one-year period "[t]he time during which a properly filed application for State post-conviction or other collateral review * * * is pending."

The district court rejected Siebert's tolling argument, holding that the statutory tolling provision did not apply, and

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[1] Siebert's conviction became final for purposes of the federal limitations period on November 5, 1990, nearly six years before AEDPA became law. Pet. App. 6a. Accordingly, Siebert's time began to run when AEDPA went into effect, and expired one year later, on April 23, 1997, more than four years before he filed his federal habeas petition. *Id.*

dismissed Siebert's petition as untimely. Pet. App. 13a, 23a. The court recognized that the timeliness inquiry in Siebert's case turned on whether his belated Rule 32 petition was "properly filed" for purposes of § 2244(d)(2)'s tolling provision. Pet. App. 5a-6a. Following *Artuz v. Bennett*, 531 U.S. 4 (2000), in which this Court expressly identified compliance with "'the time limits upon [the] delivery'" of a state post-conviction petition as a requirement for a "properly filed" petition, the Court held that it was not "properly filed." Pet. App. 8a (quoting *Artuz*, 531 U.S. at 8) (emphasis omitted). "[T]he state courts determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely"; accordingly, the district court was "compelled * * * to conclude that the untimely state petition was not a 'properly filed application' capable of tolling the limitation period and to dismiss petitioner's habeas petition as time-barred under § 2244(d)(1)." Pet. App. 13a.

4. The Eleventh Circuit reversed. Pet. App. 25a-48a ("*Siebert I*"). The court acknowledged that *Artuz* required state defendants to comply with "the time limits upon * * * delivery" of a state post-conviction petition in order to satisfy "proper filing" requirements, but speculated that this language in *Artuz* may have referenced, not statutes of limitations, but "deadlines governing service upon an opposing party" or to "the hours of business maintained by a clerks' office." *Id.* at 33a-34a. The court distinguished "between conditions to filing" a state post-conviction petition, which (according to the court) a petitioner must satisfy to qualify for tolling under § 2244(d)(1), and "conditions to obtaining relief," which a petitioner need not meet to toll the habeas limitations period. *Id.* at 33a. The court concluded that state time-bars, at least where they are not mandatory in all circumstances, belong to the latter group, for "[c]ompliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular

claim (or all claims)." *Id.* at 34a. The court held that this was true of Alabama's two-year limitations period, in particular, because application of that time bar was "discretionary" rather than either "jurisdictional" or "a matter of state entitlement." *Id.* at 35a-44a. In the Eleventh Circuit's analysis, the "discretion left to Alabama courts to enforce the time bar compels the conclusion that timeliness was not a prerequisite to filing *per se*," making Alabama's time bar "a condition to obtaining relief rather than a condition to filing." *Id.* at 44a. Because it determined that AEDPA's one-year time bar was tolled while Siebert's untimely Rule 32 petition was pending in the Alabama courts, the court concluded that his habeas petition was timely. *Id.* at 47a-48a.

5. While the case was pending on remand, this Court issued its decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), which specifically held that state law "time limits" on post-conviction applications, "no matter their form," are "'filing' conditions." *Id.* at 417. The State therefore again moved to dismiss Siebert's petition as untimely. Pet. App. 51a.

6. On February 6, 2006, the district court dismissed Siebert's habeas petition under the rule announced in *Pace*. *Id.* at 49a-66a. In *Pace*, the district court explained, "the Supreme Court had the opportunity to expound on *Artuz* in the specific context of time limits for filing," and "the Court held that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered 'properly filed' within the meaning of the AEDPA's tolling provision." *Id.* at 55a. Moreover, *Pace* rejected the theory that "'judicially reviewable exceptions'" to a state time bar make compliance with that bar any less essential for a "properly filed" petition: "The Court determined that, regardless of whether the state's statutory scheme provided exceptions to the post-conviction petition deadline, there exist 'no grounds for treating the two differently.'" *Id.* at 56a (quoting *Pace*, 544 U.S. at 412, 413).

The district court understood *Pace* to require that a state post-conviction petition is not "properly filed" for AEDPA tolling purposes "so long as the state court has deemed it untimely." Pet. App. 58a. The district court emphasized that "[n]othing in *Pace* or § 2244(d) * * * says that only 'jurisdictional' rules constitute 'conditions to filing,'" as the Eleventh Circuit held in *Siebert I*, and that *Pace* expressly "identified Alabama's time bar," "as one of the very types of rules that constitute 'conditions to filing.'" *Id.* at 61a. The district court concluded that, because the Alabama "courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed," *id.* at 59a, the petition did not toll the one-year period for seeking federal *habeas* relief. The district court therefore dismissed Siebert's federal petition. *Id.* at 65a-66a.

7. In a one-page, published decision, the Eleventh Circuit again reversed. *Id.* at 1a ("*Siebert II*"). The court adhered to its prior decision, notwithstanding this Court's intervening decision in *Pace*, on the theory "that *Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that operated as an affirmative defense." *Id.* The court thus reaffirmed its distinction from *Siebert I* between time bars that are jurisdictional and those that are not. In the Eleventh Circuit, a state post-conviction petition filed in violation of the state law limitations period is "properly filed" within the meaning of the federal habeas law, even where, as here, "the state courts determined conclusively as a matter of state law that the Rule 32 petition was untimely at the time it was filed," so long as state law does not hold the time bar to be jurisdictional. *Id.* at 59a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari—and either summarily reverse the Eleventh Circuit's judgment or set the case for full briefing and argument—because the court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As ably set forth in the certiorari petition, the rule announced by the Eleventh Circuit in this case cannot be squared with *Pace*'s categorical pronouncement that "a state post-conviction petition rejected by the state court as untimely" is not "properly filed," 544 U.S. at 410, or with *Pace*'s specific reference to Alabama's Rule 32 time bar as a requirement that petitioners must satisfy to toll AEDPA's filing deadline.

The *amici* states write separately in support of Alabama's petition and to emphasize three points. First, *Siebert I* not only reflects a misreading of *Artuz*, but in reaffirming *Siebert I* in *Siebert II*, the Eleventh Circuit overlooked the fact that this Court's intervening decision in *Pace* rejected the stated grounds for the holding in *Siebert I*. Second, the Eleventh Circuit's decision sows confusion in an area where the need for certainty and predictability is acute—the timing requirements for seeking judicial relief. Third, the Eleventh Circuit's opinion offends the principles of finality and comity that underlie federal habeas review of state-court judgments. For these reasons, and for the reasons set forth in Alabama's petition, this Court should grant certiorari and summarily reverse the Eleventh Circuit's judgment or set the case for briefing and argument.

I. By Reaffirming Its Prior Holding In *Siebert I* In A One-Page Decision Without Substantive Analysis, The Court Of Appeals Gave No Effect To This Court's Decision In *Pace*, Which Rejected The Rationale Of *Siebert I*.

A person in custody pursuant to a state court conviction has one year after his conviction becomes final within which to file

a federal habeas petition. 28 U.S.C. § 2244(d)(1). The one-year period is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). This Court addressed the meaning of the "properly filed" limitation in *Artuz*, holding that for a state post-conviction petition to be "properly filed," "its delivery and acceptance [must be] in compliance with the applicable laws and rules governing filings," which "usually prescribe, for example, the form of the document, *the time limits upon its delivery*, the court and office in which it must be lodged, and the requisite filing fee." *Id.* at 364 (emphasis added). It is not enough that the court clerk accept the submission; a state application is not properly filed when "an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee." *Ibid.* (emphasis added).

In *Siebert I*, after determining that compliance with Alabama's two-year period for filing Rule 32 petitions was not a jurisdictional prerequisite under state law, the Eleventh Circuit concluded that the time bar was a "condition to obtaining relief" rather than a "condition to filing." 334 F.3d at 1030. The court reasoned that the two-year limitations period included exceptions, meaning the state courts enjoyed some discretion to excuse tardy filings after considering factors related to their merits. *Id.* at 1029-1032. The Eleventh Circuit explained away *Artuz*'s specific reference to "time limit[s]" on two grounds: (1) on its facts, *Artuz* did not involve the timeliness of a state application; and (2) *Artuz* elsewhere reserved the question of "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Siebert I*, 334 F.3d at 1024 (citing *Artuz*, 531 U.S. at 9 n.2).

But these points, essential to the court's decision in *Siebert I*, did not survive *Pace*. Unlike *Artuz*, *Pace* involved an

untimely state application, and asked specifically whether that application was "properly filed" within AEDPA's meaning. *See Pace*, 544 U.S. at 410. And *Pace* addressed the question left open in *Artuz*: whether the fact that state law recognizes exceptions to the strict application of a post-conviction time bar means that late filings—even filings that the state courts reject solely because they are late—are nevertheless "properly filed" for purposes of tolling the federal filing deadline. *Id.* at 413. *Pace* answered that question in the negative: "When a post-conviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." *Id.* at 414 (internal quotation marks omitted). In so doing, the Court expressly rejected the position that "conditions that require some *judicial* consideration" cannot serve as conditions to proper filing. *Id.* at 414-415 (emphasis in original). Further, the Court reaffirmed its pronouncement years earlier in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), that if a state court clearly ruled that a post-conviction filing was untimely "'*that would be the end of the matter* [for tolling purposes], regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits.'" *Pace*, 544 U.S. at 414 (quoting *Saffold*, 536 U.S. at 226) (emphasis added by *Pace* Court).

In short, *Pace* did away with the essential underpinnings of *Siebert I*. *Pace* leaves no doubt that *Artuz*'s reference to "time limit[s]" as a requirement for proper filings is binding, contrary to *Siebert I* 's suggestion that this illustration was non-binding dicta. Compare *Siebert I*, 334 F.3d at 1023-24 (stating that *Artuz* did not directly address noncompliance with a state post-conviction statute of limitations), with *Pace*, 544 U.S. at 413 ("[I]n *Artuz* * * *, we held that time limits on post-conviction petitions are 'condition[s] to filing," such that an untimely filed petition would not be deemed 'properly filed.'"). And *Pace* held that adherence to state time limits on post-conviction submissions is essential for a proper filing, even if judges play

a role in determining whether a particular petition is timely. After *Pace*, it was no longer possible to maintain, as the Eleventh Circuit had in *Siebert I*, that a state court's "exercise of discretion to enforce or not enforce a post-conviction time bar itself constitutes a sufficient quantum of judicial review to effectively ratify the form and manner of a petition's filing"—meaning such a submission was "properly filed" within the meaning of AEDPA. 334 F.3d at 1032. Quite simply, *Pace*—upon which the district court based its second dismissal and upon which petitioner relied before the district court and on appeal—undercut the basis for the Eleventh Circuit's decision in *Siebert I*.

The Eleventh Circuit nevertheless reaffirmed its decision in *Siebert I* in a one-page, precedential decision that failed to account for *Pace* as intervening precedent. Rather, the *Siebert II* court distinguished *Pace* on the ground that it involved a time bar that was "jurisdictional" under state law. 480 F.3d at 1090. Despite its recognition that the question of exceptions had been reserved in *Artuz*, in *Siebert II*, the Eleventh Circuit made no effort to explain its original rationale in light of *Pace*. This Court's holding in *Pace* allowed for no distinction between jurisdictional and non-jurisdictional statutes of limitations, stating unequivocally that "time limits, *no matter their form*, are 'filing' conditions." *Pace*, 544 U.S. at 417 (emphasis added). In sum, the Eleventh Circuit boldly reaffirmed its decision in *Siebert I*, notwithstanding that *Pace* is irreconcilable with that decision's stated rationale, and on grounds that are themselves irreconcilable with *Pace*. Certiorari is warranted on this ground alone. See Sup. Ct. R. 10 (one consideration for granting certiorari is that a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court).

II. The Acknowledged Need For Certainty And Predictability In Limitations Periods Favors Both Granting The Certiorari Petition And Reversing The Eleventh Circuit's Judgment.

The Eleventh Circuit's incompatibility with *Pace* is not the only factor favoring certiorari review in this case. The fact that the decision below adds uncertainty and unpredictability to the AEDPA time bar also counsels for Supreme Court review.

Correction of the Eleventh Circuit's error is particularly crucial because of the important function played by statutes of limitations. This Court has repeatedly emphasized the importance of the policies underlying statutes of limitations. In *Board of Regents of Univ. of the State of N.Y. v. Tamanio*, 446 U.S. 478, 487 (1980), this Court stated that "[s]tatutes of limitations are not mere technicalities" but, "[o]n the contrary, they have long been respected as fundamental to a well-ordered judicial system." Consistent with this concern for the proper implementation of statutory time bars, this Court has at least twice bemoaned the time-consuming, wasteful litigation and the potentially harmful confusion caused by ambiguities in the limitations period applied to claims under 42 U.S.C. § 1983. *Owens v. Okure*, 488 U.S. 235, 240 (1989); *Wilson v. Garcia*, 471 U.S. 261, 275 (1985). As the Court observed in *Wilson*, "the legislative purpose to create an effective remedy for the enforcement of Federal civil rights is obstructed by uncertainly in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." 471 U.S. at 275; *see also Herman v. City of Chicago*, 870 F.2d 400, 402 (7th Cir. 1989) (clear time-bar rules are essential, for they avoid needless "byplay about limitations and allow[] the parties and the courts to concentrate their energies on the merits"); *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 349 (3d Cir. 1986) (noting that effectiveness of civil RICO statute is substantially thwarted by uncertainty in applicable

statute of limitations); *Smith v. City of Chicago*, 769 F.2d 408, 410-11 (7th Cir. 1985) (courts should establish understandable and simple rules for timely filing of litigation).

Without this Court's intervention, the Eleventh Circuit rule distinguishing between jurisdictional and non-jurisdictional rules will be a source of confusion. Petitioners seeking the benefit of its more relaxed filing requirement can be expected to invoke *Siebert I* and *II* in other federal circuits, in an effort to cast doubt on *Pace*'s otherwise clear pronouncement that "[w]hen a post-conviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)." 544 U.S. at 414 (internal quotation marks omitted)

Moreover, by making a time bar's "jurisdictional" character the lynchpin of its rule, the Eleventh Circuit approach frequently leaves parties without any way to know whether an untimely post-conviction filing tolls AEDPA's one-year limitations period. As petitioners point out (at pp. 28-29 of the petition), courts in many States have yet to rule definitively whether their time bars are jurisdictional. Criminal defendants and prosecutors in these States are left to speculate over when the one-year period for seeking habeas relief expires. In contrast, the standard announced in *Pace*—that "a state post-conviction petition rejected by the state court as untimely" is not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(1)—leaves no doubt that out-of-time state court petitions, whatever their effect on state court jurisdiction as a matter of state law, cannot prolong the federal filing period.

III. The Eleventh Circuit's Holding Offends The Principles Of Finality And Comity That Drive Federal Habeas Review Of State Court Judgments.

Federal collateral review of state court judgments necessarily implicates comity and finality. *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, *J.*, dissenting) (*citing*

McClesky v. Zant, 499 U.S. 467, 489-91 (1991), *Wainwright v. Sykes*, 433 U.S. 72, 80-81 (1977), *Teague v. Lane*, 489 U.S. 288, 308 (1989), and *Rose v. Lundy*, 455 U.S. 509, 515 (1982)); *see also Bell v. Thompson*, 545 U.S. 794, 812-14 (2005) (reversing court of appeals whose decision to withhold mandate did not accord appropriate level of deference to state-court judgment). Even before AEDPA, this Court emphasized that "[i]n light of 'the profound societal costs that attend the exercise of habeas jurisdiction, [the Court has] found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief'—limits that "reflect [the Court's] enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Calderon v. Thompson*, 523 U.S. 538, 554-55 (2005). "Finality is essential to both the retributive and the deterrent functions of criminal law," "enhances the quality of judging," and "serves well to preserve the federal balance." *Id.* at 555. And in passing AEDPA, Congress sought to place further limits on habeas review. *See Bell v. Cone*, 535 U.S. 685, 693 (2002) (AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law."). Among these new limits was the statute of limitations at issue here. *Day*, 547 U.S. at 202 n.1.

By reading into that statute of limitations a distinction not contemplated by this Court in *Pace* or *Artuz*, the Eleventh Circuit has opened the door for parties wishing to prolong or to avoid AEDPA's two-year limit. Moreover, its rule—hinging as it does on the sometimes ill-defined effect of late filings on subject matter jurisdiction—trenches on principles of comity and finality by making proper application of the two-year limit uncertain in many jurisdictions, where it promises to be the source of additional, wasteful litigation. For this reason also, this Court should grant certiorari.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the Eleventh Circuit's judgment or, in the alternative, set the case for briefing and argument.

Respectfully submitted.

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